(1) Supreme Court, U.S.
FILED

96 947 DEC 9 1996

No. 96-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Reuben B. Robertson III
Counsel of Record
James F. Flug
INGERSOLL AND BLOCH
1401 Sixteenth St., N.W.
Washington, DC 20036
(202) 232-1015
Attorneys for Petitioner

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

55 pp

QUESTIONS PRESENTED

1. In a diversity case raising novel and important issues of Mississippi law and public policy as to the liability of a foreign insurance company arising from its failure to disclose to its insured, to his wife, or to state medical authorities that the company's medical examination had found the husband to be infected with the AIDS virus, should the court of appeals have certified the state law issues to the Mississippi Supreme Court for an authoritative decision, rather than adopting the district court's "*Erie* guess" as to how the state court would rule?

2. Did the court of appeals necessarily violate the *de novo* standard of review mandated under *Salve Regina College v. Russell* by merely adopting, *in toto* and without comment, the district court's "*Erie* guess" on each issue of state law?

PARTIES

All parties to the proceeding in the court of appeals are identified in the caption. Jane Doe and John Doe are fictitious names that were used at times in the proceedings below in reference to Petitioner and her late husband.

TABLE OF CONTENTS

Question Presented i
Parties ii
Table of Contents iii
Table of Authorities v
Petition for a Writ of Certiorari 1
Opinions Below 1
Jurisdiction 1
Rules Involved 2
Statement 2
Reasons for Granting the Writ 8

I. To promote the objectives of uniformity among the circuits, enlightened and cooperative federalism, and adherence to this Court's own standards for avoiding unnecessary and imprudent "*Erie* guess" decisions on important issues of state law as yet undetermined by state courts, the Court should exercise its supervisory powers to require that federal courts of appeals certify such issues to state courts, where certification procedures are available, in the absence of some clear and expressed reason not to do so 8

A. This Court's decisions establish that certification should be utilized in appropriate cases to promote cooperative judicial federalism, prudent use of judicial resources, and correct results 8

B. Some of the circuits have been following this Court's lead enthusiastically, with demonstrably successful results 11

C. The Fifth Circuit, as epitomized by this case, where the panel neither considered the available option of certification nor purported to meet its obligation under *Salve Regina* to make a *de novo* prediction of state law, has become notably resistant to use of certification 14

D. Requiring greater use of certification will alleviate demands on this Court's GVR mechanism and the problems discussed in *Thomas v. American Home Products* 18

II. The circuit court's peremptory acceptance of the "*Erie* guess" made by the district court on an issue of wide public importance to the people of Mississippi, without comment and without consideration of a vital issue ignored by the district court, constitutes a clear departure from this Court's ruling in *Salve Regina* 19

Conclusion 21

TABLE OF AUTHORITIES

Cases	*Pages*
Adelberg v. Berkshire Life Ins. Co., 97 F.3d 470 (11th Cir. 1996)	12
Aldrich v. Aldrich, 375 U.S. 75 (1963)	11
American Waste & Pollution Control Co. v. Browning-Ferris, Inc., 949 F.2d 1384 (5th Cir. 1991)	17
Barnes v. Atlantic & Pacific Life Ins. Co., 514 F.2d 704 (5th Cir. 1975)	15
Batts v. Tow-Motor Forklift Co., 978 F.2d 1386 (5th Cir. 1992)	17
Belloti v. Baird, 428 U.S. 132 (1976)	8
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)	9
Clay v Sun Insurance Office, Ltd., 363 U.S. 207 (1960)	8
Colonial Properties, Inc. v. Vogue Cleaners, Inc., 77 F.3d 384 11th Cir. 1996)	11, 12
Computer Associates Int'l, Inc. v. Altai, Inc., 22 F.3d 32 (2d Cir. 1994)	11
Delaney v. Cade, 986 F.2d 387 (10th Cir. 1993)	13
Elkins v. Moreno, 435 U.S. 647 (1978)	9
Erie Railroad Co. v Tompkins, 304 U.S. 64 (1938)	*passim*
Hakimoglu v. Trump Taj Mahal Associates, 70 F.3d 291 (3rd Cir. 1995)	10, 13, 14

Houston v. Hill, 482 U.S. 451 (1987) 9

Labiche v. Legal Security Life Ins. Co.,
31 F.3d 350 (5th Cir. 1994) 17

Lawrence v. Virginia Insurance Reciprocal,
979 F.2d 1053 (5th Cir. 1992) 17

Lehman Brothers v. Schein, 416 U.S. 386 (1974) . . 8, 10

Meredith v. Winter Haven, 320 U.S. 228 (1943) . . . 10

Mosher v. Speedstar Div. of AMCA Int'l, Inc.,
52 F.3d 913 (11th Cir. 1995) 12

Protective Life Insurance Co. v. Sullivan,
89 F.3d 1 (1st Cir. 1996) 12

Salve Regina College v. Russell, 499 U.S. 225
(1991) . . . . . *passim*

*Scottish Heritable Trust v. Peat Marwick
Main & Co.*, 81 F.3d 606 (5th Cir. 1996) 18

Strange v. Krebs, 658 F.2d 268 (5th Cir. 1981) 16

Thomas v. American Home Products, Inc.,
117 S.Ct. 282 (1996) 19

Toner v. Lederle Laboratories,
779 F.2d 1429 (9th Cir. 1986) 11, 13

Trient Partners I Ltd. v. Blockbuster Entertainment Corp., 83 F.2d 704 (5th Cir. 1996) 18

Virginia v. American Booksellers Ass'n,
484 U.S. 383 (1988) 9

Walters v. Inexco Oil Co., 670 F.2d 476
(5th Cir. 1982) 16

Wecker v. Kilmer, 471 F.2d 782 (7th Cir. 1972) . . . 12

Willis v. Roche Biomedical Laboratories, Inc.,
61 F.3d 313 (5th Cir. 1995) 18

Rules and Statutes

28 U.S.C. § 1254(1). 2

Mississippi Rules of Appellate Procedure,
Rule 20 . . . . . 2, 20, 21

Other Authorities

American Judicature Society, Certification of Questions of Law: Federalism in Practice (1995). . . . 14

J. Brown, *Certification—Federalism in Action*, 7 Cumberland L. Rev. 455 (1977) 16

17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §§ 4246, 4248 (2d ed. 1988) 10, 11

D. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679-81 (1992) 13

S. Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal For Federal Court Certification to the Pennsylvania Supreme Court*, 68 Temp. L. Rev. 725 (1995) 13, 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jody H. Deramus, appearing individually and in her representative capacity as Administratrix of the Estate of Frank Deramus, deceased, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in that court's docket No. 95-60675.

OPINIONS BELOW

The memorandum opinion and order of the District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 3:92-cv-225WS, is set forth in the Appendix at pages A1-A22, and that court's final judgment is reproduced at page A23. The decision of the Fifth Circuit, which affirmed the district court ruling and adopted its memorandum opinion and order without further comment, is set forth in the Appendix at page A24. That decision is reported at 92 F.3d 274 (5th Cir. 1996), incorporating the district court opinion as an attachment. The order of the Fifth Circuit denying rehearing and rehearing en banc, printed at page A25 of the Appendix, is not officially reported.

JURISDICTION

The judgment of the court of appeals, of which review is sought by Petitioner, was entered August 7, 1996. (A24). A timely request for rehearing was denied by the court of appeals on September 10, 1996. (A25). Jurisdiction is conferred upon this Court to review the judgment by 28 U.S.C. § 1254(1).

RULES INVOLVED

Mississippi Rules of Appellate Procedure:

RULE 20. CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) When Certified. When it shall appear to the Supreme Court of the United States or to any United States Court of Appeals that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion concerning such questions or propositions of Mississippi law. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) Method of Invoking Rule. The provision of this rule may be invoked by the federal court, upon its own motion or the suggestion or motion of any interested party when approved by the federal court.

* * *

STATEMENT

In early 1988, Frank Deramus of Louisville, Mississippi, a policyholder of Respondent Jackson National Life Insurance Company, a Michigan corporation, applied to the company for additional term coverage. His wife, Petitioner Jody Deramus, likewise applied for a Jackson National Life policy as replacement for a policy on her life issued by Equitable Life Assurance Society. Respondent required

medical examinations of both applicants. After receiving the results of their tests, Respondent denied the additional coverage that Mr. Deramus had requested. A few days later it accepted the coverage applied for by Petitioner and issued a policy on her life.

At first Respondent falsely informed Mr. Deramus that his application for additional insurance was turned down for the reason that "delivery of the policy was not accepted." Later Respondent wrote to its licensed agent in Columbus, Mississippi that he had been rejected "due to confidential medical information." Respondent did not comply with repeated oral and written requests for particulars; although it promised to supply the information to Mr. Deramus's designated physician, it failed to do so. Letters sent by Mr. Deramus to Respondent, asking the company to provide his doctor with all information about his medical condition, were not even answered.

The actual reason that Respondent denied additional coverage was its discovery that — unknown to Mr. Deramus or his wife or his physicians — he had the AIDS virus. The company learned this from the results of HIV Western Blot Banding Pattern and ELISA blood tests, repeatedly reconfirmed by its testing laboratory. The test results were received by Respondent's medical director, Lewis Stewart, M.D. on April 21, 1988.

Still, Respondent failed to inform Mr. Deramus, his doctors, or his spouse, of the positive HIV test results or the reason for its rejection of his application. Mississippi, like Respondent's domicile state and most other states, has a strong public policy that all cases of "reportable" diseases, including AIDS and other sexually transmitted diseases, be

reported to state health authorities, that appropriate counseling be provided for victims, and that preventive measures be taken to protect others from infection. See, *e.g.*, Mississippi State Department of Health, Rules and Regulations Governing Reportable Diseases (1985). The company neither arranged nor suggested any follow-up counseling efforts and did not even report to state health authorities the fact that Mr. Deramus had tested positive. Nothing was done to see that Jody Deramus was appropriately warned of the risk of HIV infection from her husband. In fact, the record shows that Mr. and Mrs. Deramus were actively trying to conceive a child during that period. Since Mr. Deramus had never engaged in homosexual activity or any other activity which would place him in a known risk group for the disease, they had no reason to suspect the possibility of HIV infection. The fact that Petitioner was issued a new policy at the same time her husband was declined coverage appeared to rule out the possibility of his having a fatal infectious disease that could be transmitted to her through normal marital relations.[1]

Frank Deramus grew progressively ill over the year and a half following the rejection of his insurance application, and during that time he saw and was treated by at least 26 physicians for his unexplained illness. Still, the critical and unambiguous test result that Respondent had received was not disclosed to Mr. Deramus or to any of his doctors, and none of them diagnosed the nature or source of his problem. In October, 1989, Mr. Deramus was hospitalized at the Johns

---

[1]Respondent's own underwriting guidelines, consistent with industry practice, called for rejection of applicants who were exposed to AIDS infection through sexual contact.

Hopkins Medical Center in Baltimore. There, for the first time, he learned that he had the AIDS virus.

For 18 months the insurance company, with certain knowledge that Frank Deramus was infected, deliberately kept the information secret from the couple as well as their doctors. But, also unknown to Mr. Deramus and his wife, who was the named beneficiary of his existing $500,000 policy, Respondent had immediately placed a conspicuous notice in its internal policy file, in large hand-written letters: "DO NOT REINSTATE". That meant that, in the event Mr. Deramus might inadvertently forget to make a premium payment on time, permitting Respondent to cancel his policy, the company's normal reinstatement procedures would not be honored — with the result that a $500,000 death benefit would not have to be paid when he died. Although it did not tell its insured or state health officials, Respondent immediately shared its "confidential medical information" concerning Mr. Deramus's abnormal blood test with over 600 companies that subscribe to the Medical Information Bureau, an insurance industry health information databank.

During that 18-month period of concealment, before they learned the truth at Johns Hopkins, Petitioner and her husband were deprived of the opportunity to seek medical treatment that could have extended and enhanced his life, and of the opportunity to protect Petitioner from the risk of getting AIDS from her husband.

Frank Deramus died of AIDS on June 28, 1991. Nine days earlier, after three-plus years of concealment and broken promises, Respondent finally sent the 1988 HIV test results to Mr. Deramus's physician.

* * *

After the death of her husband, Petitioner asserted claims on her own behalf and for her late husband's estate against Respondent in an action filed in Circuit Court for Hinds County, Mississippi. The suit sought damages for exposing her to the risk of AIDS infection, by lulling her into a false sense of security that her husband did not have a deadly sexually-transmitted infection when it issued a policy on her life. It also sought recovery from Respondent on various legal grounds for having failed and refused to disclose Mr. Deramus's HIV infection to him or his doctors. Respondent promptly removed the case to the United States District Court for the Southern District of Mississippi, based on diversity of citizenship.

In September, 1995, the district court granted summary judgment in favor of Respondent. Acknowledging that the issue of the insurance company's duty of disclosure of HIV infection was unsettled under Mississippi law, the district court faced the need to prophecy how the highest state court would rule:

> The Mississippi courts, thus far, have not yet spoken definitively to the question of whether an insurer has a duty to disclose to insurance applicants the results of medical examinations which detect that an applicant is suffering from a life-threatening or debilitating disease. Since Mississippi has not directly addressed this issue, this court must make an *Erie*-guess as to how the Mississippi Supreme Court would rule. (A7-A8).

Its guess led the district court to conclude that Petitioner's claims would not be deemed legally sufficient under the law of Mississippi, if decided by the state court. The district court largely limited its review to several past decisions of the Mississippi Supreme Court, arising in other distinguishable contexts and factual settings. It did not undertake to evaluate decisional trends or consider other indicators of public policy, such as legislative or regulatory pronouncements, that might be taken into account by the state court were the case in fact presented to it. The district court took an extremely narrow view of the personal claims asserted by Petitioner, affording them almost no consideration except as a tag-along to the claims of her deceased husband. The fact that Respondent made what could readily be viewed as a lulling misrepresentation to Petitioner, in issuing her a new life insurance policy while denying her husband's application because of the undisclosed HIV infection, was not discussed. Nor did the court explain why the year and a half of unnecessary and unwitting exposure to AIDS infection, and Petitioner's subsequent anguish and lingering fear of infection which arose when she learned the truth, could not be redressed under the law of Mississippi. However, based on its "*Erie*-guess", final judgment was entered against Petitioner by the district court, dismissing each and every claim.

On appeal, the court of appeals affirmed the judgment. It issued a one-sentence per curiam order, adopting *in toto* the district court's opinion as the basis for its decision, without any other substantive discussion or explanation. Thereafter rehearing was denied in a form order, with no comment.

REASONS FOR GRANTING THE WRIT

I

To promote the objectives of uniformity among the circuits, enlightened and cooperative federalism, and adherence to this Court's own standards for avoiding unnecessary and imprudent "*Erie* guess" decisions on important issues of state law as yet undetermined by state courts, the Court should exercise its supervisory powers to require that federal courts of appeals certify such issues to state courts, where certification procedures are available, in the absence of some clear and expressed reason not to do so.

A. This Court's decisions establish that certification should be utilized in appropriate cases to promote cooperative judicial federalism, prudent use of judicial resources, and correct results.

Ever since *Clay v Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), this Court has encouraged use of state-enacted certification procedures, under which federal courts may submit issues of state law to a state's highest court for authoritative determination. Certification of unsettled state law questions has turned out to be a brilliant innovation and one of the great success stories of cooperative federalism.

Use of the procedure was wholeheartedly endorsed in *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), because certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." Later in *Belloti v. Baird*, 428 U.S. 132, 150-51 (1976), the Court noted the considerable advantages of certification over abstention, holding that the construction

of a Massachusetts law should have been certified to the Supreme Judicial Court of Massachusetts, and directing the lower court on remand to do so. In *Salve Regina College v. Russell*, 499 U.S. 225, 237 n.4 (1991), the Court again noted that, "Of course, a question of state law usually can be resolved definitively if the litigation is instituted in state court and is not finally removed to federal court, or if a certification procedure is available and is successfully utilized." See also, *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978)("In a federal system, it is obviously desirable" for vitally important issues of state law and public policy to be "decided in the first instance by state courts....[W]here as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)("Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when...the state courts stand willing to address questions of state law on certification from a federal court."); *Houston v. Hill*, 482 U.S. 451, 475 (1987)(Powell, J., dissenting) ("The Court repeatedly has emphasized the appropriateness of certification in cases presenting uncertain questions of state law."); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988)(state law issues certified *sua sponte* to Virginia Supreme Court).

Nevertheless there remains a lack of clarity as to when federal courts should certify issues of state law. Obviously, most issues of state law in federal litigation do not warrant use of the device, because usually the state rules of decision are relatively clear. But there are numerous cases where the answers are far from clear, the issues are vitally important to

the states and their citizens, and there exists no pressing urgency, in which federal circuit courts are still engaging in unnecessary and inferior "*Erie*-guess" decision making. There is still confusion as to how the doctrine of *Meredith v. Winter Haven*, 320 U.S. 228 (1943), addressing *Pullman*-type abstention, should apply to the use of certification procedures, if at all. See 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4246 (2d ed. 1988).

Lehman Brothers v. Schein left the use of certification to "the sound discretion of the federal court." 416 U.S. at 391. Additional guidance from this Court to aid and inform that discretion is now appropriate, in view of the enormous growth in availability of state law certification procedures since *Lehman Brothers* was decided in 1974.[2] At the least, circuit courts which engage in self-described "*Erie* guesses", despite the availability of certification procedures for referral to state courts, should be required to explain why they are not following the preferred route of certification.

Greater use at the appellate level of certification rather than speculation to resolve important, unsettled state law questions is entirely consistent with, if not implicitly required by, the decision in *Salve Regina College v. Russell, supra.* Under that decision, circuit judges may no longer give deference to their district court counterparts on matters of

---

[2]At least 43 states, the District of Columbia and Puerto Rico now provide for certification of state law issues by federal circuit courts, and the Judicial Conference of the United States adopted a formal recommendation in 1995 endorsing procedures for submission of novel or difficult state law questions. *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291, 303 (3rd Cir. 1995)

state law. Therefore, unless they use certification, circuit court panels must engage in their own *de novo* predictions on difficult state law issues. That process will necessarily entail substantial judicial time and effort. The guesses may be incorrect and subject to later disapproval by the state courts, are likely to result in inconsistent rules, and will create incentives for forum shopping. All of these consequences can be avoided or at least minimized by judicious referrals of the unclear state law issues to the appropriate state courts with the unique competence to make such rulings.

B. Some of the circuits have been following this Court's lead enthusiastically, with demonstrably successful results.

Certification is now frequently used by federal appellate courts, especially in diversity cases, as "a means to obtain authoritative answers to unclear questions of state law," *Toner v. Lederle Laboratories*, 779 F.2d 1429, 1432 (9th Cir. 1986)(Kennedy, J.). Consistent with practice in this Court, certification of uncertain state law issues is typically ordered on the referring court's own motion. 17A Wright, Miller & Cooper, *supra* § 4248, 176; see, *e.g.*, *Aldrich v. Aldrich*, 375 U.S. 75, 249 (1963)(per curiam)(*sua sponte* referral of "questions of Florida law that are determinative of this cause, with respect to which questions there seem to be no clear controlling precedents in the decisions of the Supreme Court of Florida"); *Computer Associates Int'l, Inc. v. Altai, Inc.* 22 F.3d 32 (2d Cir. 1994)(whether discovery rule operates to toll limitations as to alleged trade secret theft under Texas law certified *sua sponte* to Texas Supreme Court); *Colonial Properties, Inc. v. Vogue Cleaners, Inc.*, 77

F.3d 384, 386-87 (11th Cir. 1996) (*sua sponte* certification of trespass issue under Alabama law); *Protective Life Insurance Co. v. Sullivan*, 89 F.3d 1 (1st Cir. 1996) (interpretation of Massachusetts incontestability statute certified *sua sponte* to state Supreme Judicial Court).

The Eleventh Circuit appears to apply a presumption in favor of certifying unsettled state law issues when possible. For example in *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913 (11th Cir. 1995), the court stated that

> [w]here there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* "guesses" and to offer the state court the opportunity to interpret or change existing law.

Id., 916-17 (footnote omitted). Likewise the Eleventh Circuit in *Colonial Properties, supra*, stated:

> While the district court may have been entirely correct in its prediction..., the fact remains that this is a case of first impression under Alabama law. Rather than speculating about how the Alabama courts would answer this question, we prefer to certify the issue for resolution by the Alabama Supreme Court.

77 F.3d at 386-87. *Accord, Adelberg v. Berkshire Life Ins. Co.* 97 F.3d 470 (11th Cir. 1996).

Other circuits have acted accordingly. See, *e.g.*, *Wecker v. Kilmer*, 471 F.2d 782, 783 (7th Cir. 1972)(Stevens, J.)("It

appears to this court that the question...is controlled by the law of the State of Indiana; that the answer to that question will determine this appeal; that there are no clear controlling precedents in the decisions of the Supreme Court of Indiana; and that, accordingly, this is an appropriate question to be certified to that Court...."); *Toner v. Lederle Laboratories, supra*, at 1430 ("resolution of this appeal requires us to address unsettled questions of Idaho law, and we deem it appropriate to permit the judicial system of that state to address those matters."); *Delaney v. Cade*, 986 F.2d 387 (10th Cir. 1993)(certification made to Kansas Supreme Court "[c]onsistent with our judicial policy that matters of state law should first be decided by state courts"). Judges of the Third Circuit likewise believe that certification to the state court is appropriate "when (1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent through which the federal court could resolve the issue." *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291, 303 (3rd Cir. 1995)(Becker, J., dissenting on the merits but "enthusiastically" joined on this point by the two other panel members, see *id.* 293 n. 2).

The availability and efficacy of procedures to certify uncertain issues of state law has made the "*Erie* guess" predictive technique an outmoded relic. A more explicit preference for use of certification where available is consistent with federalism principles, as reflected in *Erie*, and would have a number of salutary effects. For example, "wrong" guesses by federal circuit courts which have later been disapproved or "reversed" by state court judges are numerous and well documented. See, *e.g.*, D. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679-81 (1992); S.

Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal For Federal Court Certification to the Pennsylvania Supreme Court*, 68 Temp. L. Rev. 725 (1995). That awkward and unseemly situation is avoided entirely if the state law issues have been referred to and resolved by state courts. Moreover, for federal judges to admit that they have only "guessed" as to what the applicable law is, when a simple and relatively efficient procedure exists to determine it with certainty, casts discredit on the judicial system and is inherently inconsistent with their obligations under *Erie* and *Salve Regina*. Certification likewise helps avoid inconsistent answers to important questions of state law, the untoward effects of *Erie* guessing on the development of state law, and incentives for forum shopping.

C. The Fifth Circuit, as epitomized by this case, where the panel neither considered the available option of certification nor purported to meet its obligation under *Salve Regina* to make a *de novo* prediction of state law, has become notably resistant to use of certification.

Notwithstanding its success as an alternative to the "*Erie* guess" technique of predicting state law, certification is not being used in all or nearly all appropriate cases. According to a survey by the American Judicature Society, cited by Judge Becker in *Hakimoglu v. Trump Taj Mahal Associates*, *supra*, 70 F.3d at 303, only 54 percent of the federal circuit judges who responded expressed willingness to certify state law questions, while 80 percent of the state supreme court justices were willing to answer certified questions. American Judicature Society, Certification of Questions of Law: Federalism in Practice 43, 46 (1995).

However, 95 percent of the circuit judges and 87 percent of the state justices, reflecting on their most recent certified case, were satisfied with the process. *Id.* 42-43. These results indicate that (a) certification of state law issues is working very well, but (b) a substantial portion of the federal appellate bench is still resistant to or unaware of the benefits of certification. Resistance is most evident in decisions of the Fifth Circuit, which appears to have taken a considerable step backward in recent years.

Under the prodding of the late Chief Judge John R. Brown, the Fifth Circuit previously took a prominent role of leadership in the effective and appropriate use of certification to state courts. Thus in *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704, 705 (5th Cir. 1975), "a historic case, not because of the intrinsic difficulty of the issues, but because this is our first published opinion utilizing the certification provisions recently adopted by the citizens of Alabama", the court wrote:

> While we do not denigrate the conclusions of the District Judge, we select the certification option because of the uncertainty of the Alabama law governing this case. This uncertainty coupled with the not infrequent result that a Federal Court of Appeals is "reversed" by the highest court of the *Erie* state make this a peculiarly appropriate case for certification. * * *
>
> When the state law is in doubt especially on the underlying public policy aims, it is in the best administration of justice to afford the litigants a

> consistent final judicial resolution by utilizing the certification procedure.

Id. 706 (footnotes omitted). The court in *Walters v. Inexco Oil Co.*, 670 F.2d 476, 477 (5th Cir. 1982), "[g]uided by principles of Our Federalism," certified a state law question to the Supreme Court of Mississippi, because:

> Whether the [state] statute should apply in the present action, we simply cannot tell. Concerned not to violate our *Erie* duty of applying the substantive law of the forum state in a diversity case, we seek a definitive answer to this question from the one court both intellectually capable *and* constitutionally entitled to supply one. Indeed, as the case involves questions of local Mississippi policy, this course accords with our carefully wrought system of federalism. We should hesitate to "trade [our] judicial robes for the garb of prophet", J. Brown, *Certification—Federalism in Action*, 7 Cumberland L. Rev. 455 (1977), when the procedure of certification to the Supreme Court of Mississippi renders the crystal ball unnecessary. In following that course, we once again seize the opportunity to praise, extol, laud, and proclaim the virtues of this wonderful device that "without abdicating one Article III function", *Strange v. Krebs*, 658 F.2d 268, 269 (5th Cir. 1981), enables us to obtain a definitive answer when *Erie* charts a perilous course through uncharted waters.

Id., 478 (footnotes omitted), citing *Erie Railroad Co. v Tompkins*, 304 U.S. 64 (1938).

Despite Judge Brown's contributions, however, the Fifth Circuit was already moving in the opposite direction before his death in 1993. See, *e.g.*, *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1392 (5th Cir. 1991)(court declines request for certification and decides novel issues of Louisiana tort law and statutory construction by "*Erie* guess"). Judge Brown strongly dissented from the court's refusal in that case to certify the state law issues: "Floundering around, at best, in an effort to predict what the Supreme Court of Louisiana would do, we deny, not only to the parties but to the jurisprudence of Louisiana as well, the opportunity to obtain an authoritative answer to the problem facing this panel." *Id.*, 1395.

Regrettably, the Fifth Circuit is now consistently ignoring the availability of and need for certification while struggling with difficult and unsettled issues of state law. See, *e.g.*, *Lawrence v. Virginia Insurance Reciprocal*, 979 F.2d 1053 (5th Cir. 1992)(making "*Erie* guess" and rejecting request for certification as to sovereign immunity of community hospital and insurance coverage issue under Mississippi law); *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1389, 1399 (5th Cir. 1992) ("*Erie* guess" made on unsettled points of Mississippi strict liability and negligence doctrines, over vigorous dissent, with no consideration of certification); *Labiche v. Legal Security Life Ins. Co.*, 31 F.3d 350, 352, 354 (5th Cir. 1994)(because Louisiana Supreme Court had not ruled on dispositive insurance law issue, "we are constrained to make an '*Erie* guess' on how that court would rule" although concurring judge objects to

panel's refusal to certify); *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313 (5th Cir. 1995) ("*Erie* guess" made as to Texas negligence law without considering certification); *Scottish Heritable Trust v. Peat Marwick Main & Co.*, 81 F.3d 606, 613 (5th Cir. 1996) (making "*Erie* guess" as to scope of accountants' liability to third parties under Texas law, without considering certification); *Trient Partners I Ltd. v. Blockbuster Entertainment Corp.*, 83 F.2d 704 (5th Cir. 1996)("Recognizing the dangers of making an 'Erie guess,'" but again without considering certification, court decides unsettled issue of Texas contract law).

The present case exemplifies the policy now being followed in the Fifth Circuit — charging ahead with speculative answers on broadly important and unsettled issues of state law and public policy, while ignoring the availability of certification procedures in every state within the circuit. The practice is not only improvident and contrary to comity and federalism principles, but it conflicts with the practices of this Court and other circuits.

D. Requiring greater use of certification will alleviate demands on this Court's GVR mechanism and the problems discussed in *Thomas v. American Home Products*.

Disciplined utilization of certification procedures will solve at least part of the dilemma posed by this Court's GVR caseload — those cases where the Court summarily grants certioriari, vacates the decision of a circuit court of appeals, and remands for further consideration in the light of an intervening state court decision, even though the matter may not otherwise meet the criteria for review on certiorari. See,

e.g., *Thomas v. American Home Products, Inc.*, 117 S.Ct. 282 (1996), and the concurring opinion of Justice Scalia and the dissent of Chief Justice Rehnquist. Many of these cases are products of wrong "*Erie* guesses" by the circuits. In *Thomas*, for example, contrary to its otherwise exemplary practice and as if to demonstrate that nobody's perfect, the Eleventh Circuit twice ignored the availability of certification to the Supreme Court of Georgia on issues of Georgia law in product liability litigation, twice made *Erie* guesses, and twice got them wrong. Such problems and the perceived need for intervention by the Supreme Court largely dissolve if the circuit court determines the dispositive state law issues by means of certification to the state court.

II

The circuit court's peremptory acceptance of the "*Erie* guess" made by the district court on an issue of wide public importance to the people of Mississippi, without comment and without consideration of a vital issue ignored by the district court, constitutes a clear departure from this Court's ruling in *Salve Regina*.

It is impossible to tell from its order whether the court of appeals in this case complied or did not comply with the *de novo* standard of appellate review mandated by *Salve Regina, supra*. The court failed to state what standard of review it believed was applicable or to give any explanation of its decision to affirm the judgment below, other than to adopt the reasoning stated by the district court in its memorandum opinion. If anything, the words used by the court in its cryptic, *per curiam* order imply deference rather than independent analysis, as does the fact that the points

made by Petitioner as to errors in the lower court's opinion were ignored. Furthermore, the district court had no alternative to making an "*Erie* guess", as no procedure for certification was available at that level. See Miss.R.App.P., Rule 20. Unlike the district court, the court of appeals did have the option to certify, but made no mention of that distinction and no explanation of why it opted in favor of an "*Erie* guess" by the lower court, rather than certification — again suggesting improper deference.

The content of the district court's opinion, which the Fifth Circuit adopted as setting forth the "basis" for its affirmance, substantiates that its review could not have been *de novo*. Important potential sources of liability asserted by Petitioner were not addressed. For example, as part of her individual claim Petitioner submitted an affidavit in the district court establishing that she relied on Respondent's issuance of her policy of life insurance in 1988 as an assurance that the reason for its rejection of her husband's application could not have been a deadly contagious disease. Ignoring that undisputed summary judgment evidence, the district court failed to offer any explanation of why Petitioner's reliance would have been unreasonable in the circumstances and why it could not have established liability for fraud or negligent misrepresentation under Mississippi law. The court of appeals, affirming the grant of summary judgment as to that aspect of her claim "on the basis of" the district court opinion which did not address it, could not have been exercising independent, *de novo* review of the state law issues. Nor did the court of appeals even claim that it had performed such a review. In these circumstances, it clearly violated the obligations imposed by *Erie* and *Salve Regina*, calling for reversal by this Court for that reason.

CONCLUSION

The Court should issue a writ of certiorari to review the decision of the court of appeals, which should thereupon be vacated and remanded with instructions to certify the issues of state law to the Supreme Court of Mississippi pursuant to Rule 20 of the Mississippi Rules of Appellate Procedure.

Respectfully submitted,*

Reuben B. Robertson III
Counsel of Record
James F. Flug
INGERSOLL AND BLOCH
1401 Sixteenth St., N.W.
Washington, DC 20036
(202) 232-1015

Dated: December 9, 1996

---

*Petitioner and her counsel express their appreciation for the assistance of Rachel Clark of Harvard Law School in preparing this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:92-cv-225WS

JANE DOE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN DOE — PLAINTIFF

vs.

JACKSON NATIONAL LIFE INSURANCE COMPANY — DEFENDANT

MEMORANDUM OPINION AND ORDER

Both the plaintiff and defendant herein contend that under the undisputed facts each is entitled to a judgment against the other. Defendant Jackson National Life Insurance (hereinafter "JNL") has submitted alternative motions under Rules 12(b)(6)[1] and 56(b),[2] Federal Rules of Civil

---

[1]Rule 12(b)(6) of the Federal Rules of Civil Procedure provides:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> > (b) failure to state a claim upon which relief can be granted, ...

[2]Rule 56(b) of the Federal Rules of Civil Procedure provides:

> (b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory

(continued...)

Procedure, respectively, asking this court to dismiss plaintiff's action for failure to state a claim, or for summary judgment. Plaintiff Jane Doe,[3] individually and as administratrix of the Estate of John Doe (hereinafter "plaintiff" or "Doe") opposes defendant's motion, while submitting her own motion under Rule 56(a),[4] Federal Rules of Civil Procedure, asking this court to hold that under the undisputed facts defendant is liable to plaintiff. While the parties champion their respective positions and sharply disagree over the proper outcome of these motions, the parties are in accord over the identity of the key question and factual underpinnings of this litigation. In this diversity-of-citizenship action, our widowed plaintiff, Jane Doe, contends that JNL breached its duty to her, as well as to her deceased husband, John Doe, to inform them or

---

[2](...continued)

judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[3]Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (holding that after "a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings," a party may be permitted to proceed under a fictitious name.

[4]Rule 56(a) of the Federal Rules of Civil Procedure provides:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part, thereof.

their designated physician of John Doe's HIV-positive condition, when, during JNL's processing of John Doe's application for insurance which included a mandatory medical examination, JNL had discovered that circumstance, but did not reveal this information to the Does. Plaintiff has fired a volley of legal theories at the court which, according to plaintiff, shows that JNL owed a duty to plaintiff under Mississippi law and the factual circumstances peculiar to this case. Unfortunately for plaintiff, this court is persuaded that plaintiff's arguments miss the mark and that summary judgment, while appropriate, must be entered for the defendant. Making an Erie-guess, this court holds that under Mississippi law an insurer has no duty to inform an insurance applicant of the results of a medical examination where the insurer administers the examination only to determine the insurability of the applicant.

PARTIES AND JURISDICTION

Jane Doe is an adult citizen of a State other than Michigan and serves as Administratrix of the Estate of John Doe, her husband, who died in the state of plaintiff's residence.

Defendant JNL is a life insurance company incorporated in Michigan with its headquarters in Lansing, Michigan. JNL is licensed to do business in Mississippi and has designated Cary Bufkin, Esq., of Jackson, Mississippi, as its agent for service of process.

This court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1332,[5] diversity of citizenship.Since the court's jurisdictional grant is based upon diversity of citizenship, and since the factual backdrop of this dispute occurred in Mississippi, this court applies the substantive law of Mississippi to this dispute. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Boardman v. United Service Auto. Association, 742 F.2d 847, 849 (5th Cir. 1984); Mitchell v. Craft, 211 So.2d 509, 516 (Miss. 1968) (Mississippi choice of law rules direct its courts to apply a center of gravity test.).

FACTS

In January, 1988, Mr. Doe had a life insurance policy with defendant which provided coverage of $500,000.00. Desiring additional life insurance, Mr. Doe applied for an increase of $300,000.00. Mrs. Doe simultaneously submitted an application for $250,000.00 of life insurance to replace a policy she held with another insurance company.

As part of its application process, JNL required its applicants to submit to medical examinations at Examination Management Services, Inc., (EMS), a paramedical facility designated by JNL. These examinations, which included

---

[5]Title 28 U.S.C. § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interests and costs, and is between--

(1) citizens of different States; ...

blood and urine tests, were vital to JNL's underwriting procedure. JNL reserved the right to refuse coverage if an applicant failed the medical examination. No one disputes that it was JNL's policy at the time to deny life insurance coverage to any individual who tested positive for the Human Immunodeficiency Virus (HIV), also known as the Acquired Immune Deficiency Syndrome (AIDS) virus. So, as part of its medical examination, JNL tested the blood of its applicants to detect any presence of antibodies or antigens to HIV.

On April 19, 1988, EMS, JNL's contract laboratory for blood work, ran a variety of tests on the Does' blood. Mr. Doe's blood tested positive for HIV. Mrs. Doe's tested negative. Thereafter, on April 21, 1988, the laboratory sent a telecopy of the Does' results to Dr. Lewis L. Stewart, Jr., JNL's medical director. Five days later, Ed Keller, the JNL underwriter in charge of the Does' applications, received a copy of the laboratory results. Keller then rejected Mr. Doe's application.

The notice of rejection mailed to Mr. Doe on April 26, 1988, did not tell him that he had been rejected because of the HIV test. Instead, by mistake, according to JNL, the notice sent to Mr. Doe stated that his application had been rejected "because delivery of the policy was not accepted." But, this oversight was rectified two days later when Oscar Arinder, Mr. Doe's agent, learned that Mr. Doe's application had been rejected for medical reasons. Arinder then communicated this information to Mr. Doe who, in turn, asked Arinder to try to ascertain the specific results of his medical examination. Arinder telephoned JNL's regional office but was unable to obtain the information. Arinder then advised Mr. Doe to submit a written request to JNL for the

information. On May 23 and July 5 of 1988, according to the plaintiff, Mr. Doe sent letters to JNL's Michigan office asking JNL to send all information concerning his medical condition to his physician, Dr. Barry L. White.[6] Mr. Doe's request was not honored.

In May of 1988, Mr. Doe was hospitalized at the Mississippi Baptist Medical Center in Jackson, Mississippi. During his hospital stay, Dr. Eric McVey, a specialist in infectious diseases, visited Mr. Doe and asked him if he had ever exposed himself to any HIV risk factors. Mr. Doe answered in the negative. No blood test was conducted at that time to detect the existence of HIV.

Eighteen months after undergoing the medical examination in connection with his life insurance application, Mr. Doe was hospitalized at Johns-Hopkins Medical Center ("Johns-Hopkins") in Baltimore, Maryland. While there, Mr. Doe was diagnosed as being HIV-positive. Immediately after Mr. Doe tested positive for the HIV virus, Mrs. Doe took an HIV test. Her test, as had the blood test administered by JNL, indicated that she was not HIV-positive. Mrs. Doe has since taken additional tests and all of them have shown that she does not have HIV.

By April of 1991, Mr. Doe's condition had deteriorated and he was again hospitalized at Johns-Hopkins. At that time, Mr. Doe once more wrote to JNL requesting that JNL submit the results of his 1988 medical examination to his physician, Dr. Donald M. Poretz of Annandale, [sic] Virginia. Nine days

---

[6]The defendant contests this assertion but, convinced the accuracy of the statement has no bearing on these motions, does not challenge such under these motions.

before Mr. Doe succumbed to AIDS, his doctor received a report from JNL. The report revealed that Mr. Doe had tested positive for HIV in 1988.

DISCUSSION

The pivotal issue this court must resolve is whether under Mississippi law JNL had a duty to disclose to the Does the results of Mr. Doe's medical examination required by JNL as part of its insurance application process. Of course, the existence of a defendant's duty to act or not to act is a fundamental element of tort law. Ward v. Hobart Manufacturing Company, 450 F.2d 1176, 1181 (5th Cir. 1971). A duty may arise specifically by mandate of statute, generally by operation of law under application of the basic rule of common, or frequently out of a contractual relationship. George B. Gilmore Co. v. Garrett, 582 So.2d 387, 391 (Miss. 1991) citing Pinnix v. Toomey, 242 N.C. 358, 362, 87 S.E.2d 893, 897-898 (1955). Whether a defendant is under any duty, the violation of which would subject him to tort liability, is a legal question for the court to determine. Stanley v. Morgan & Lindsay, Inc., 203 So.2d 473 (Miss. 1967).

Inasmuch as this court's jurisdiction is grounded in diversity, the often-cited case of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), commands this court to employ the substantive law of Mississippi to determine the outcome of this dispute. The Mississippi courts, thus far, have not yet spoken definitively to the question of whether an insurer has a duty to disclose to insurance applicants the results of medical examinations which detect that an applicant is suffering from a life-threatening or debilitating disease. Since Mississippi has not

directly addressed this issue, this court must make an Erie-guess as to how the Mississippi Supreme Court would rule. See United Parcel Service, Inc. v. Weber Industries, Inc., 794 F.2d 1005, 1008 (5th Cir. 1986) ("when making an Erie-guess in the absence of explicit guidance from the state courts, we must attempt to predict state law, not to create or modify it.").

Plaintiff, too, states that the Mississippi Supreme Court has not dealt with the specific issue before the court in this case. Nevertheless, says plaintiff, firmly embedded in Mississippi jurisprudence are accepted causes of action which would accommodate the theory of liability here being urged. Firstly, says plaintiff, JNL's duty arose out of a confidential relationship with her and her husband. Secondly, by requiring plaintiff's husband to take a medical examination and to disclose his confidential medical history, plaintiff says JNL undertook an act toward the Does that required JNL to act reasonably and with due care. Thirdly, says plaintiff, because she and her husband were JNL policyholders and because they completed insurance applications with JNL, JNL had a duty to conduct its affairs in good faith and fair dealing. Fourthly, says JNL, this court should impose a duty on JNL, says plaintiff, because it was foreseeable that harm would ensue from JNL's failure to inform plaintiff and her husband of Mr. Doe's HIV-positive status. The court will address each of these arguments.

CONFIDENTIALITY OF THE RELATIONSHIP

According to plaintiff, the occasion which brought her and her husband together with JNL created a confidential relationship because JNL demanded access to confidential information and retained exclusive control of Mr. Doe's

medical test results. This confidential relationship, argues plaintiff, was special and placed on JNL certain duties, one of which was to disclose the adverse results of medical examinations. Plaintiff relies heavily upon the case of Lowery v. Guaranty Bank and Trust Co., 592 So.2d 79 (Miss. 1991), as her authority, particularly the statement in Lowery that:

> A confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger.

Id. at 83. (Emphasis added). However, the above quote from Lowery does not embrace the facts sub judice to establish the existence of a confidential relationship. Lowery involved a demonstrated course of conduct between the parties whereby the plaintiff was justified in relying on the defendant bank to protect a particular interest which was at stake. The defendant bank had a history of dealing with the plaintiff and her husband whereby the bank would place certain notes on hold until the husband could come in and take care of them. During this course of dealings, the plaintiff's credit life insurance was allowed to lapse and this resulted in the plaintiff not having the benefit of such credit life insurance upon the death of her husband. The Court held that because of the course of conduct between the parties the plaintiff and her husband had justifiably relied on the defendant bank to their detriment.

> The evidence indicates that because of the history of dealings with (defendant) and because the

> (defendant) bank placed the notes on hold until (plaintiff's husband) could come in and take care of them (the plaintiff and her husband) relied on that relationship and placed trust and confidence in (the bank) to the point of being less vigilant about the coverage of their credit life insurance than they had been in the past. If that were the case, the bank owed them the duty to notify them that the credit life insurance had lapsed and that it would not be in force while they waited on (plaintiff's husband) to return.

Id. at 85.

Thus, relative to the creation of a confidential relationship, Lowery holds that there must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence of a particular risk; and, moreover, such justifiable reliance must have necessarily caused the first party to be lulled into a false sense of security so that the first party did not protect his own interest as he might have ordinarily.

The factual urgings here simply fail to allow plaintiff here to step into the status of the Lowery plaintiff. Unlike the defendant bank in Lowery, JNL in no way mislead the Does into any inaction. JNL never promised the Does that JNL would warn them of any medical risks to their health, nor did JNL ever advise the Does that its silence as to the specific result of the medical examination should be construed as a positive medical finding. To the contrary, JNL here specifically advised the Does that JNL undertook simply to determine for itself whether it would accept the risk of

providing insurance coverage to the Does. This set of circumstances hardly shows any justifiable reliance by the Does that JNL would do anything other than perform the limited function of a life insurance business, i.e., consider their applications for life insurance and possibly extend life insurance coverage upon any acceptance of such applications. Moreover, there is absolutely no proof that the Does in any way relaxed the care and vigilance that they would normally have exercised in looking out after their own health conditions in reliance upon any finding by JNL.

DUTY TO PROTECT LIFE AND LIMB

Plaintiff says that by requiring her and her husband to submit to medical examinations, JNL undertook "the performance of an act" which required JNL to act reasonably and with due care, citing Dr. Pepper Bottling Co. v. Bruner, 245 Miss. 276, 148 So.2d 199 (1962). In Dr. Pepper, while delivering soft drinks to a local drug store, a Dr. Pepper employee pushed a cart loaded with soft drinks into the plaintiff's leg. Id. at 200. On appeal, Dr. Pepper contended that it was entitled to a preemptory instruction. Id. However, the Mississippi Supreme Court affirmed the lower court and gave the following discussion about duty:

> As a general rule, it is the natural inherent duty owed by one person to his fellowmen, in his intercourse with them, to protect life and limb against peril, when it is in his power to reasonably do so. The law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons — the duty to exercise his senses and intelligence to avoid injury, and he may be

> held accountable at law for an injury to person or property which is directly attributable to a breach of such duty ... Stated broadly, one who undertakes to do an act or discharge a duty by which conduct of others may be properly regulated and governed is under a duty to shape his conduct in such manner that those rightfully led to act on the faith of his performance shall not suffer loss or injury through his negligence.

Dr. Pepper, 148 So.2d at 201.

So, while it is true that JNL had a duty to conduct its affairs reasonably and with due care, in this case that duty did not require JNL to protect plaintiff and her husband from harm from any force(s) that JNL did not set into motion. Dr. Pepper Bottling Co. v. Bruner, then, has no coverage over the facts here.

Plaintiff also cites several cases in which physicians have been found negligent for acts they performed even though no physician-patient relationship existed, the principal case of which is Meena v. Wilburn, 603 So.2d 866 (Miss. 1992) (holding that "a doctor may be held liable for negligence if the traditional elements — duty, breach of duty, causation, and injury — are evidenced, where such liability is not negated by the absence of a doctor-patient relationship."). Meena, however, is not applicable here.

In Meena, a physician negligently instructed his nurse to remove the staples from the wrong patient's leg. When the physician undertook the task to treat the patient, he commensurately undertook a duty to perform that task with care. See George B. Gilmore Co. v. Garrett, 582, So.2d 387,

391 (Miss. 1991). As a result of the physician's negligence, the patient was injured.

The instant case is quite different. JNL is not a physician, but an insurance company. Additionally, there is no evidence here showing plaintiff to have been treated by a physician. Rather, plaintiff merely submitted blood samples that were later tested by a laboratory. This factual scenario hardly equates to that of Meena, which simply involved a physician, who, because of his special discipline, is under a special duty. Moreover, here there is no evidence that JNL acted or failed to act in such a way which facilitated Mr. Doe's contraction of and eventual death from A.I.D.S.

Plaintiff also urges this court to follow Meinze v. Holmes, 532 N.E.2d 170 (1987). In Meinze, the plaintiff argued that a disability insurer had a duty to inform the insured about significant medical information it had acquired by reason of examination of the insured person and his medical files. The Meinze Court held that the disability insurer fulfilled its duty when it delivered copies of its physicians' reports to plaintiff's attorney. Id. at 174.

Contrary to plaintiff's view, Meinze does not stand for the proposition that an insurer is under an absolute duty in all circumstances to disclose to the insured a newly discovered medical risk or danger unknown to the insured. In fact, the Meinze Court specifically stated that because the record was lacking, it was unable to determine "what sort of circumstances will create a duty to disclose, what is the extent of that duty, and what actions will fulfill it." Id. at 173. The Meinze Court stated instead that it was "unwilling to develop a comprehensive statement of the duty to disclose beyond the requirements of the appeal." Id. Accordingly, the

Court found that the only question it needed to address was, in light of the mode of disclosure utilized, whether under the circumstances the duty of care was fulfilled by that disclosure. Id. at 173. Thus, Meinze stands only for the proposition that where the insurer discloses information, such disclosure must be done with due care.

A further distinguishing factor of Meinze is that there was a relationship between the insurer and insured. The plaintiff in Meinze had a disability policy with the insurer. Here, there was no relationship (i.e., contract) between the plaintiff and her husband and JNL as it relates to their 1988 applications. The Does merely completed applications for life insurance coverage. JNL accepted the applications for processing. JNL, however, did not accept Mr. Doe's offer to sell him a policy. As such, the Meinze relationship between the parties there is lacking here.

Additionally, plaintiff cites a litany of cases which plaintiff insist holds that an employer or prospective employer owes a duty to convey the results of medical exams it requires an employee or prospective employee to take. See Daly v. United States, 946 F.2d 1467 (9th Cir. 1991) (where employer was a hospital and pre-employment exam was conducted by hospital physician, court extended the physician's duty to disclose beyond the physician/patient relationship); Green v. Walker, 910 F.2d 291 (5th Cir. 1990) (court held when individual is required, as condition of future or continued employment, to submit to medical examination, that examination creates a relationship between examining physician and examinee); Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351, 356 (N.Y. 1959) (court held complaint stated cause of action which alleged employer

gratuitously provided medical examinations to its employees, had a policy of revealing any irregularities, discovered that plaintiff who relied upon the policy had a serious disease, but did not disclose same to him); Dornak v. Lafayette General Hospital, 399 So.2d 168, 170 (La. 1981) (court held that hospital employer was obligated to disclose to plaintiff any dangerous condition realized at a pre-employment examination conducted by hospital physician); Betesh v. United States, 400 F.Supp. 238, 246 (D.D.C. 1974) (Government breached its own policy of advising rejected examinees to seek medical attention. Furthermore, "having assumed to act, the Government physicians were under a duty to act carefully, not merely in the conduct of the examination but also subsequent communications to the examinee."); Beadling v. Sirotta, 197 A.2d 857 (N.J. 1964) (court did not reach the issue of employer liability). These cases are not persuasive. Upon close scrutiny of each of these cases, it becomes apparent that plaintiff's interpretation of these cases is either erroneous or that the case is clearly distinguishable. These cases deal either with the extension of the duty of a physician hired by a hospital employer (Daly v. United States, 946 F.2d 1467 (9th Cir. 1991); Dornak v. Lafayette General Hospital, 399 So.2d 168, 170 (La. 1981)), with employers which violated their own documented disclosure policy (Betesh v. United States, 400 F.Supp. 238, 246 (D.D.C. 1974)), Wojcik v. Aluminum Co. of America, 183 N.Y. 2d 351 (N.Y. 1959), or with circumstances where the courts did not even reach the issue of employer liability with regards to non-disclosure (Green v. Walker, 910 F.2d 291 (5th Cir. 1990); Beadling v. Sirotta, 197 A.2d 857 (N.J. 1964)). As earlier stated, the instant case does not involve the violation of a documented disclosure policy nor treatment by

a physician.

Where a physician is directly involved, people have a right to expect a certain degree of care and disclosure on their health and health related matters regardless of whether a doctor/patient relationship exists. See Meena v. Wilburn, 603 So.2d 866 (Miss. 1992). Indeed, disclosure to, at least, the patient is essential to the treatment and retardation of diseases and other ailments. However, this court is not persuaded, nor does Mississippi law support such a conclusion, that an insurance company should bear the same burden of care as a physician, i.e. divulging the results of a medical examination. A physician and an insurance company, serve to different purposes in our society. A physician is sworn to protect and respect human life. An insurance company, on the other hand, by insuring those individuals it perceives as "insurable," is here to soften the blow of natural and artificial disasters, be it death, fire or flood. To hold insurance companies to the same standard as physicians would be to expect expertise on health related matters from an entity which hasn't the knowledge or the resources.

The Mississippi Supreme Court case of Puckett v. Refenacht, Bromagen, & Hertz, 587 So.2d 273 (Miss. 1991), sheds some light on the instant issue, although it is not a case involving the duty to protect life and limb. Therein, the Mississippi Supreme Court stated:

> If a society is to be free, it must demand of every person who, completely on his own, makes a mistake that he has no legal right to shift from his shoulders onto another's the suffering it causes. In our modern society, en masse we are our brother's keepers; we pay taxes for schools, highways,

> public health and hundreds of other public programs. On an individual basis, however, no man should be required by law to pay for what was solely and purely another man's mistake.
>
> It may be morally reprehensible for one man to watch another open a window on the twentieth floor of a skyscraper, climb through it and jump out, when he could have easily reached out and stopped him. To impose a legal responsibility upon the bystander to stop him, however, is an entirely different matter.

Puckett, 587 So.2d at 278. In other words, where a party does not create or cause the peril, said party is under no obligation to prevent the consequences of the peril. Accordingly, plaintiff's reliance upon the rubric in Dr. Pepper for her "duty to protect life and limb" claim is misplaced. JNL did not infect Mr. Doe with H.I.V. This being so, JNL was under no obligation to inform Mr. Doe that he was so infected, even though this may have been the morally correct thing to do.[7]

DUTY OF GOOD FAITH AND FAIR DEALING

Plaintiff says that JNL owed a duty to her and her husband because of its contractual relationship with them —

---

[7]Of course, this court is aware of at least one case (outside the State of Mississippi) where a plaintiff sued a medical provider for incorrectly advising her that she had AIDS, where over a two-year period she had altered her lifestyle and prepared for death. Although this point was not specifically mentioned by JNL, perhaps this fear of being wrong and having to face a possible lawsuit prompted it to refuse to make disclosure. But this is pure speculation on the court's part.

the Does were JNL policyholders and they applied for insurance with JNL in 1988. Consequently, says plaintiff, JNL owed them a duty of good faith and fair dealing. See Cenac v. Murray, 609 So.2d 1257, 1272 (Miss. 1992) (stating that every contract imposes upon each party a duty of good faith and fair dealing).

The duty of good faith and fair dealing, which applies to both the insurer and the insured "requires abstinence by all parties from commission of wrongful conduct which injures 'the right of [the another] to receive the benefits of the agreement.'" Andrew Jackson Life Insurance Co., v. Williams, 566, So.2d 1172 (Miss. 1990) citing Shipstead & Thomas, Comparative and Reverse Bad Faith.

Any contractual relationship between Mr. Doe and JNL was based upon the life insurance policy already in existence at the time he applied for and was later denied additional coverage. There is no indication from the record that JNL did not fulfill its obligation to Mr. Doe under the first insurance policy. As for Mrs. Doe, although she and JNL had a contractual relationship via her own life insurance policy, there is no indication that the defendant, by not divulging Mr. Does condition to Mrs. Doe, interfered with Mrs. Doe's rights to receive the benefits of the agreement between Mrs. Doe and JNL.

DUTY TO WARN OF FORESEEABLE HARM

Plaintiff says that this court should impose a duty on JNL in this case because it was foreseeable that harm would likely ensue from a given act or omission. Plaintiff points to Foster v. Bass, 575 So.2d 967 (Miss. 1990), for support. In Foster, the father of an adopted child suffering from mental

retardation caused by Phenylketonuria (PKU) brought an action against, inter alia, the private adoption agency, alleging that defendant was negligent in failing to test the child for PKU at the time of his birth and negligent in failing to provide proper medical information. Foster, 575 So.2d at 968. Pursuant to defendant's motion, the trial court granted summary judgment, concluding "that there [was] no evidence which would allow a reasonable jury to conclude that [the defendant] breached a duty proximately causing [the plaintiff's] injury. Id. at 969. On appeal, the Mississippi Supreme Court, also refused to impose a duty on Catholic Charities for failing to ensure that a child placed through its adoption agency had been tested for Phenylketonuria ("PKU"). Id. at 981.

On its way to its decision, the Mississippi Supreme Court conducted a foreseeability analysis, starting with the following observation:

> For actionable negligence to exist, the defendant must owe the plaintiff a legal duty. We noted Mississippi's adoption of this universal principle in Ward v. Hobart Mfg. Co.
>
> A duty does not exist, "[i]f the defendant could not reasonably foresee any injury as the result of his acts, or if his conduct was reasonable in the 'light of what he could anticipate'" ... The rationale behind this foreseeability requirement is that no one is expected to guard against events which are not reasonably to be anticipated or that are so unlikely that the risks would be commonly disregarded.

Karpovs v. State, 663 F.2d 640, 649 (5th Cir. 1981)(citations omitted).

Foster, at p. 975.

Then, after detailing a number of factors which countered this foreseeability requirement, namely, the rarity of the disease, the lack of physical symptoms, the absence of medical doctors on the agency's staff, the agency's reliance on outside physicians and the adopting parents' responsibility to obtain certification from their own pediatrician that the adopted child was in good health, the Mississippi Supreme Court held as a matter of law that Catholic Charities reasonably could not have foreseen the injury from its failure to inform the doctors that the adopted child had not been tested for PKU.

The holding and analysis in Foster do not serve as any basis for liability here. Foster does not stand for the recognition of any duty owed by JNL to the plaintiff. The foreseeability of harm analysis undertaken by the Mississippi Supreme Court was simply one of the policy factors considered by the Court in determining whether a duty existed in Foster.[8] After balancing the relevant factors, the

---

[8]"The policy factors which must be considered in determining whether a duty exists have been judicially defined as follows: the foreseeability of harm, the degree or certainty of injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, costs, and prevalence of insurance for risk

(continued...)

Mississippi Supreme Court stated that:

> There also is no evidence which supports a finding of foreseeability of harm to Geoffrey as a consequence of a blank on Catholic Charities' medical information form, such that the form would be deemed the proximate cause of his damages.

Foster, at p. 983.

The Foster holding applies here against the plaintiff. There is no evidence here to show JNL's failure to disclose the results of its test proximately caused John Doe's damages. John Doe was stricken with the disease before he undertook application for additional insurance with JNL. Once JNL rejected his application on medical grounds, John Doe was on notice that JNL was of the opinion that he had some uninsurable medical ailment detected from tests on his urine or blood. It would have been a simple matter for John Doe to submit urine and blood samples to his own physician for further testing. JNL could reasonably have expected John Doe to follow this course. John Doe instead did not place his physician on notice of JNL's rejection and later even told his hospital physician that he had no reason to suspect he had AIDS, a statement which persuaded the hospital physician not to test for the disease. These facts simply fail to show any liability by JNL to plaintiff under any analysis conducted under Foster.

---

[8](...continued)
involved." Foster, 575 So.2d 967, 979 (Miss. 1990) quoting Richard P. v. Vista Del Mar Child Care Service, 106 Cal. App.3d 860, 165 Cal.Rptr. 370 (1980).

CONCLUSION

Having explored the juridical theories advanced by plaintiff, this court finds that none of them under Mississippi law subjects defendant to liability here for failing to disclose the results of its test on plaintiff's blood. Accordingly, this court grants defendant's motion for summary judgment. The plaintiff's motion for partial summary judgment is denied. A separate judgment shall be entered in accordance with the local rules.

SO ORDERED AND ADJUDGED, THIS THE 29th DAY OF SEPTEMBER, 1995.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

[DISTRICT COURT CAPTION]

FINAL JUDGMENT

This cause came on for hearing on the motion of the defendant for summary judgment. After consideration of the motion, evidence offered in support of the motion, and the arguments in memoranda of the parties, the court finds that the motion is well taken and should be granted. The Memorandum Opinion and Order of this court dated September 29, 1995, and the findings of fact and law included therein are incorporated by reference. For the reasons assigned in that order, the court concludes that judgment should be entered in favor of the defendant and against the plaintiff and that the defendant should be awarded its costs. Additionally, the plaintiff's motion for partial summary judgment is denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the complaint be, and it is hereby DISMISSED WITH PREJUDICE in accordance with this court's order at the cost of the plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is entitled to recover its taxable costs in this action upon filing a Bill of Costs in the time and manner prescribed.

SO ORDERED AND ADJUDGED, THIS THE 29th DAY OF SEPTEMBER, 1995.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

[Filed August 7, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60675

JODY DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,

Plaintiffs - Appellants,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Mississippi

---

Before KING, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

The judgment of the district court is affirmed on the basis of the district court's Memorandum Opinion and Order attached hereto.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60675

JODY DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,

Plaintiffs - Appellants,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant - Appellee

* * *

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8/7/96, 5 Cir., _____, _____ F.3d _____)

(SEPTEMBER 10, 1996)

Before KING, SMITH and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

[signature illegible]

United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-947

In The

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS,

Petitioner,

vs.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D. COLLIER GRAHAM, JR.
Counsel of Record
EUGENE NAYLOR
DEBBIE GOSWAMI
SHELL, BUFORD, BUFKIN,
CALLICUTT & PERRY
Attorneys for Respondent
920 Trustmark Building
P.O. Box 157
Jackson, Mississippi 39205
(601) 948-2291

70333 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

45 pp

QUESTIONS PRESENTED

I. WHETHER THE ISSUE OF CERTIFICATION WHICH WAS NOT RAISED IN THE LOWER COURT CAN BE BROUGHT FOR REVIEW BEFORE THE UNITED STATES SUPREME COURT, AS THE MATTER HAS NOT BEEN PRESERVED FOR APPEAL.

II. WHETHER THE FIFTH CIRCUIT ERRED BY ADOPTING THE DISTRICT COURT'S OPINION, AND NOT EXPRESSLY VERBALIZING ITS STANDARD OF REVIEW AS DE NOVO.

III. WHETHER THERE IS ANY SPLIT IN THE CIRCUITS SINCE ALL CIRCUITS UNDERSTAND THAT THE USAGE OF CERTIFICATION IS DISCRETIONARY AND ALL CIRCUITS APPRECIATE THEIR DUTIES TO MAKE PREDICTIONS OR *ERIE*-GUESSES ON MATTERS OF STATE LAW.

IV. WHETHER RESORT TO CERTIFICATION BY THE FIFTH CIRCUIT IS NECESSARY WHEN THERE EXISTS AMPLE AUTHORITY IN MISSISSIPPI CASE LAW UPON WHICH TO BASE ITS DECISION.

V. **WHETHER THE PETITIONER SHOULD BE ALLOWED TO ARGUE TO THIS COURT THAT THE LAW WAS UNSETTLED AND AMBIGUOUS, WHEN IN THE LOWER COURTS, SHE ADVANCED THE OPPOSITE THEORY THAT THE LAW WAS SUFFICIENTLY CLEAR AND IN HER FAVOR SO AS TO AWARD HER SUMMARY JUDGMENT AS A MATTER OF LAW.**

VI. **WHETHER CERTIFICATION SHOULD BE PURSUED AS IT IS NOT EXPEDIENT, AND THERE IS NO GUARANTEE THAT THE MISSISSIPPI SUPREME COURT WILL ANSWER THE CERTIFIED QUESTION.**

LIST OF INTERESTED PARTIES

The Petitioner is Jody Deramus, individually, and as administratrix of the Estate of Frank Deramus.

The Respondent is Jackson National Life Insurance Company, a wholly owned subsidiary of Prudential Corporation, p.l.c. London, England.

TABLE OF CONTENTS

Questions Presented i

List of Interested Parties iii

Table of Contents iv

Table of Authorities vi

Respondent's Brief in Opposition 1

Opinions Below 1

Statement of Jurisdiction 2

Statement of the Case 3

Reasons for Denying the Writ 8

I. The record is devoid of any indication that the Fifth Circuit employed any other standard than de novo review. 8

II. The certification issue was not raised in the lower court, and is therefore procedurally barred from review by the United States Supreme Court. 11

III. All circuits understand that certification is discretionary, and there is no confusion or conflict among the circuits on the use of certification. 13

A. There is no confusion among the circuits as to certification. 15

B. Having certified in the recent past a similar question to the Mississippi Supreme Court, and having the benefit of other existing Mississippi case authority, the Fifth Circuit had a more than ample basis to decide the issue of law without resorting to certification. 21

1. Certification in the recent past on question of duty was applicable authority. 22

2. Clear and controlling precedent existing in Mississippi case law on the duty to disclose. 24

C. The Petitioner contradicts herself and advances a theory on appeal which is inconsistent with that argued in the lower courts, and is therefore, procedurally barred. 26

Conclusion 29

TABLE OF AUTHORITIES

CASES

Alexander v. Town & Country Estates, Inc.,
535 F. 2d 1081 (8th Cir. 1976) 28

Barnes v. Atlantic & Pacific
Life Ins. Co. of America,
514 F. 2d 704 (5th Cir. 1975) 14

Batts v. Tow-Motor Forklift Co.,
66 F. 3d 743 (5th Cir. 1989) 17

Boyter v. C.I.R. Services,
668 F. 2d 1382 (4th Cir. 1981) 14

Browzin v. Catholic University of America,
527 F. 2d 843 (D.C.Cir. 1975) 28

California v. Taylor,
353 U.S. 553 (1957) 11

Campbell v. Cutler Hammer, Inc.,
996 F. 2d 1164 (11th Cir. 1993) 20

Canton v. Harris, 489 U.S. 378 (1989) 11

Capps v. Humble Oil & Refining Co.,
536 F. 2d 80 (5th Cir. 1976) 28

Colonial Properties, Inc. v. Vogue Cleaners,
Inc., 77 F. 3d 384 (11th Cir. 1996) 15,19

Cowan v. Ford Motor Company, 437 So.2d 46 (Miss. 1983) 15

Dabney v. Montgomery Ward & Co., Inc., 761 F. 2d 494 (8th Cir.1985) 17

E.E.O.C. v. Fair Labor Relations Authority, 476 U.S. 19, 24 (1986) 11, 12

Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978) 14,16

Farsian v. Pfizer, 52 F. 3d 932 (11th Cir. 1995) 20

Foster v. Bass, 575 So. 2d 967 (Miss. 1990) 25

F.T.C. v. Grolier, 462 U.S. 19, 23 n.6 (1983) 9,11

Giffin v. Summerlin, 78 F. 3d 1227 (7th Cir. 1978) 17

Henkin v. Northrop Corp., 921 F. 2d 864 (9th Cir. 1990) 17

Hines v. Joy Mfg. Co., 850 F. 2d 1146 (6th Cir. 1988) 17

Howell v. Celotex Corp., 904 F. 2d 3 (3rd Cir. 1990) 16

Houston v. Hill, 482 U.S. 451 (1987) 13,14,18,21

In re Fingado, 955 F. 2d 31 (10th Cir. 1992) 19

Jackson v. Johns-Mansville Sales Corp., 781 F. 2d 394, *cert. denied*, 478 U.S. 1022 (5th Cir. 1986) 16

Jones v. Harris, 460 So.2d 120 (Miss. 1984) 15

Kassman v. America University, 546 F. 2d 1029 (D.C.Cir. 1976) 28

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 12, 13,14,17,18,20

Long v. Patterson, 22 So. 2d 490 (Miss. 1945) 24,25

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 2

Marston v. Red River Levee & Drainage Dist.,632 F. 2d 466 (5th Cir. 1980) 20

Meredith v. City of Winter Haven, 320 U.S. 228 (1943) 14,17

McGuire Oil Co. v. Mapco, Inc., 958 F. 2d 1552 (11th Cir. 1992) 20

Micomonaco v. State of Washington, 45 F. 3d 316 (9th Cir. 1995) 19

Morrissey v. Williams Morrow & Co., Inc., 739 F. 2d 962 (4th Cir. 1984) 16

Noble v. U.S. Parole Comm'n, 82 F. 3d 1108 (D.C. Cir. 1996) 19

Oklahoma Tax Commission v. Chickasaw Nation,
515 U.S. ___, 132 L.Ed.2d 400 (1995) 12

Patz v. St. Paul Fire & Marine Ins. Co.,
15 F. 3d 699 (7th Cir. 1994) 19

Plummer v. Lederle Laboratories, Div. of
American Cyanamid Co., 819 F. 2d 349
(2nd Cir. 1987) 16

Puckett v. Rufenacht, Bromagen & Hertz,
587 So. 2d 273 (Miss. 1991) 21,22,23,25

Roe v. Doe, 28 F. 3d 404 (4th Cir. 1994) 19

Roe v. State of Alabama, 68 F. 3d 404
(11th Cir. 1995) 20

Ryans v. Royal Ins. Co. of America,
916 F. 2d 731 (1st Cir. 1990) 16

Salve Regina College v. Russell,
499 U.S. 225 (1991) 9,10,14,18

Starks v. Rent-A-Center,
58 F. 3d 358 (8th Cir. 1995) 19

Tarr v. Manchester Ins. Corp.,
544 F. 2d 14 (1st Cir. 1976) 28

Towne Realty, Inc. v. Safeco Ins. Co.
of America, 854 F. 2d 1264 (11th Cir. 1988) 17

Transamerica Ins. Co. v. Duro Bag Mfg. Co.,
50 F. 3d 370 (6th Cir. 1995) 19

Transcontinental Gas Pipeline Corp. v. Transportation
Ins. Co., 958 F. 2d 622 (5th Cir. 1992) 19

Universe Tankships, Inc. v. United States,
528 F. 2d 73 (3rd Cir. 1975) 28

United States v. Williams, 504 U.S. 36 (1992) 11

VanHaaren v. State Farm Mut. Auto.
Ins. Co., 989 F. 2d 1 (1st Cir. 1993) 18

Wassall v. DeCaro, 91 F. 3d 443
(3rd Cir. 1996) 18

Watson v. City of New York, 92 F. 3d 31
(2nd Cir. 1996) 18

Weiss v. United States, 787 F. 2d 518
(10th Cir. 1986) 17

Youakim v. Miller, 425 U.S. 231 (1976) 9

RULES AND STATUTES

Mississippi Rules of Appellate Procedure, Rule 20 15,21

Mississippi State Department of Health, Rules and
Regulations Governing Reportable Diseases (1985) 5

OTHER SOURCES

17A Wright, Miller & Cooper, Federal Practice and Procedure; Jurisdiction 2d § 4248 (2d ed. 1988) 20,21

Steve Kirchmayr, *Reducing the Appellate Docket*, Mississippi Judicial College News (1996) 15

APPENDIX

Steve Kirchmayr, *Reducing the Appellate Docket*, Mississippi Judicial College News (1996) A1

RESPONDENT'S BRIEF IN OPPOSITION

In this case, the Petitioner asserts that review by the Supreme Court is warranted in order to bring into equilibrium the rate at which the various circuits certify state law questions. This quest for certification parity is a smokescreen not deserving of treatment on either substantive or procedural grounds, as the issue was never put before the lower court. It is disingenuous in the extreme for Mrs. Deramus to have argued in both the district court and the Court of Appeals that existing Mississippi law was sufficiently clear and in her favor for her to prevail on the issues, and now that the merits have been decided adversely to her, to argue that state law on the subject was so unclear that certification to the Mississippi Supreme Court was mandated, even in the absence of a request on her part for certification. She wants nothing less than the proverbial second bite at the apple. Moreover, the Petitioner never once argues in her certiorari petition that the district court or the Court of Appeals wrongly decided the merits of her case, or that the Mississippi Supreme Court would have decided any differently. Accordingly, Respondent Jackson National Life Insurance Company respectfully requests this Court deny writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

All lower court opinions in this matter are set forth in the Appendix attached to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

A writ of certiorari is not a matter of right, but of judicial discretion. The discretionary grant of a writ is reserved for exceptional cases: first, where review is necessary to secure uniformity of decision between and among the Courts of Appeals, and second, where the case involves questions of importance which it is in the public interest to have decided by this Court of last resort. Magnum Import Co. v. Coty, 262 U.S. 159 (1923). Jurisdiction in the Supreme Court is not exercised merely to give the defeated party in the Court of Appeals another hearing. Id.

The decision of the United States Court of Appeals for the Fifth Circuit in the Case of *Jody Deramus v. Jackson National Life Insurance Company*, No. 95-60675, which Petitioner seeks to review herein by certiorari, rests on no proposition which creates an actual conflict between the United States Courts of Appeals. While the writ petition is laced with the appropriate "conflict among circuits" trimmings, the alleged "conflicting" issue of certification was never put before the lower court for its review, and as such, this newly presented argument may not be properly considered by this Court. By belatedly raising the certification issue, Petitioner is merely seeking another hearing in another forum. This tactic cannot supply a basis for jurisdiction in this Court which is otherwise clearly lacking. Furthermore, this case does not involve any issues the settlement of which is of national importance, as the underlying dispute is a private tort claim for monetary damages, and the Fifth Circuit's per curiam affirmance of the trial court's interpretation of Mississippi precedent did not, as Petitioner contends, suddenly create a public policy question.

STATEMENT OF THE CASE

The Petitioner's statement of the facts makes several bold assertions which are nowhere contained in the record, and more seriously, many misrepresentations of which Respondent is compelled to make this Court aware.

In January 1988, Frank Deramus had a life insurance policy with Jackson National Life Insurance (hereinafter "JNL"), which provided coverage of $500,000. Mr. Deramus, in an effort to increase his coverage, applied for additional life insurance in the amount of $300,000. Mrs. Deramus also submitted an application for a $250,000 life insurance policy with JNL.

As part of the application process, JNL required its applicants to submit to certain blood tests through local paramedical facilities used by JNL. The results of these tests were used by JNL to assess its underwriting risk in extending insurance coverage to its applicants. JNL reserved the right to refuse coverage if an applicant failed the blood tests.

Before Mr. Deramus submitted a blood sample, he signed a consent form wherein he acknowledged what tests his blood might be subjected to, including HIV, that JNL was performing these lab tests exclusively for its own purposes of evaluating an underwriting risk, and that as member of the Medical Information Bureau (hereinafter "MIB" which is an insurance industry databank organized for the prevention of fraud among insurance applicants), JNL had the right to submit

those test results to MIB.[1] Unfortunately, when JNL received the results, they indicated that Mr. Deramus was HIV positive. Consistent with its underwriting standards, JNL rejected Mr. Deramus' application for additional life insurance; however, Mrs. Deramus was issued a policy.

The notice of rejection mailed to Mr. Deramus on April 26, 1988, did not tell him that he had been rejected because of the blood test results. Instead, through clerical error, the form letter indicated that his application had been rejected "because delivery of the policy was not accepted." However, the oversight was corrected two days later when the Deramuses' agent was advised that Mr. Deramus' application was rejected for medical reasons, and he in turn notified and communicated to Mr. Deramus that his application was declined for undisclosed and nonspecific confidential medical reasons.

Petitioner's assertion that Mr. Deramus asked repeatedly for his medical information is simply not true.[2] Moreover, Mr.

---

1. In the event of an HIV-positive test result, the report would merely indicate that the applicant had a nonspecific abnormal blood test result. Petitioner asserts that the test results were received by a Dr. Lewis Stewart. This is not true. The record is undisputed in reflecting that the testing laboratory put the name of JNL's medical director, Dr. Stewart, on the test results as a matter of protocol indicating that he was the medical director for JNL, but the test results were sent straight to the underwriting department.

2. JNL has no record of any request from Mr. Deramus prior to April 1991, and upon receipt of that request, JNL promptly provided the test results to his designated physician. Furthermore, the record simply does not support the claim that anyone made a promise to disclose the medical information to Mr. Deramus. The Deramuses' agent merely suggested to Mr. Deramus that he could attempt to write JNL requesting information regarding the medical

Deramus did not rely on JNL to supply him with a diagnosis of his condition since the record is exceedingly clear that during the eighteen months following the denial of the additional life insurance by JNL, Mr. Deramus was under the active care and treatment of over twenty physicians, several of whom specialized in the diagnosis of infections, such as HIV. Thus, a blood test could have been run by any of Mr. Deramus' physicians at any time.[3]

In October 1989, Mr. Deramus was hospitalized at Johns-Hopkins Medical Center, where he was diagnosed as HIV infected. Mrs. Deramus was also tested shortly thereafter, and was found to be uninfected. Subsequent testing of Mrs. Deramus shows that she remains uninfected[4] and that there is no

---

reasons for rejecting his application; however, he did not guarantee that any information would be forthcoming.

In any event, whether or not the Deramuses made a request for information is immaterial to the resolution of the duty issue under Mississippi law. JNL did not assume or undertake any duty to advise Mr. Deramus as to the condition of his health, and Mr. Deramus never acted with justifiable reliance on JNL to function in the role of a physician.

3. Petitioner asserts that Mississippi has a public policy that encourages reporting of sexually transmitted diseases to the appropriate state authorities. Mississippi State Department of Health, Rules and Regulations Governing Reportable Diseases (1985). However, the Petitioner fails to note that these Rules and Regulations only apply to physicians within the State of Mississippi.

4. Petitioner asserts that she and her husband had been trying to conceive a child during this period. The record is completely bereft of this information, (and Respondent denies same). The Petitioner further asserts that Mr. Deramus did not engage in homosexual or other high risk activity to expose him to the HIV virus. Again, the record does not support this

realistic chance that she will ever be HIV infected due to any possible exposure from Mr. Deramus. On June 28, 1991, Mr. Deramus died from AIDS related complications.

On March 19, 1992, Mrs. Deramus, individually and as the administratrix of the estate of her deceased husband, Mr. Deramus, filed a Complaint against JNL in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking individual tort damages in the amount of $5,000,000 for actual damages, and $10,000,000 in punitive damages; the Complaint did not seek injunctive or declaratory relief. JNL removed the action to the United States District Court for the Southern District of Mississippi on the basis of diversity jurisdiction.

On April 18, 1994, the Plaintiff-Petitioner moved for a partial summary judgment on the issue of liability taking the position that there was "no genuine issue of material fact" and that she was entitled to a ruling "as a matter of law" on the claim that JNL owed and breached a duty to disclose to her and her husband the results of the blood test run in conjunction with their applications for insurance to JNL. In response, JNL filed its own cross-motion to dismiss or for summary judgment, arguing that as a matter of law it had no duty to disclose to the Deramuses the results of its risk evaluation, including blood tests, and that regardless of the existence *vel non* of any duty to disclose medical information, JNL was still entitled to a summary judgment because the record revealed that no injury or damage was proximately caused or contributed to by the alleged negligence of JNL. **The Petitioner at no time during**

---

assertion. Petitioner also claims that she faced exposure to HIV through her husband; again, all subsequent tests on Mrs. Deramus show that she is HIV negative.

the district court litigation suggested that Mississippi law on the issues presented was unclear; to the contrary, Plaintiff-Petitioner argued that there was no genuine issue of material fact and that the law was sufficiently clear to enable her to prevail as a matter of law.

Upon reviewing the respective cross-motions, the district court, in a rather lengthy and exhaustive opinion, rejected each of the Plaintiff's various theories for the recognition of a duty. The district court made an *Erie*-guess, as this exact fact pattern had never been presented to the Mississippi Supreme Court, and interpreted existing Mississippi case law to determine the course the Mississippi Supreme Court would follow. The district court responded to each issue raised.

The case was appealed to the Fifth Circuit. In addition to receiving the respective briefs of the parties, the Fifth Circuit granted Mrs. Deramus' request to present oral argument. **In neither oral argument nor in her brief and reply brief submitted to the Fifth Circuit, did the Plaintiff-Petitioner ask for certification of the primary question. As Petitioner again argued that the law was sufficiently clear and in her favor, she in effect assured the Fifth Circuit that it was capable of deciding the duty question without the assistance of the Mississippi Supreme Court**. Moreover, both the Plaintiff-Petitioner and the Defendant-Respondent, as is written in their respective briefs, agreed that the standard of review was de novo. After considering the arguments raised in the briefs and at oral arguments, the Fifth Circuit affirmed the ruling of the district court in an unanimous per curiam opinion.

The Plaintiff-Petitioner then filed a petition for rehearing en banc. In that brief, **Mrs. Deramus again chose not to**

request certification of a question to the Mississippi Supreme Court, and did not press her recently-formulated argument that the Court of Appeals allegedly failed to employ a de novo standard of review. In a rather emotional plea, Plaintiff again relied on Mississippi jurisprudence, which she claimed "contain[ed] numerous examples" of a statutory or common law obligation to compel disclosure, thereby arguing that Mississippi law was clear and in her favor. (Appellant's Rehearing Brief at 12). The Fifth Circuit denied rehearing.

Hence, this Petition for Writ of Certiorari followed. However, instead of pursuing the legal theories asserted in the lower courts, the Petitioner has decided to put before this Court issues never seen or heard of in this case until now. Moreover, the Petitioner is attempting to invoke this Court's discretionary certiorari power by creating from whole cloth a "conflict among circuits" argument to gain entrance to this Court.

REASONS FOR DENYING THE WRIT

I.

THE RECORD IS DEVOID OF ANY INDICATION THAT THE FIFTH CIRCUIT EMPLOYED ANY OTHER STANDARD THAN DE NOVO REVIEW.

The Petitioner contends that Salve Regina College v. Russell, 499 U.S. 225 (1991) mandates that de novo review be conducted for all district court judgments in which an *Erie*-guess was made on a question of state law in the disposition of the case. It is further asserted that the Fifth Circuit did not review the decision of the district court de novo, and that

consequently, certiorari should be granted to correct this alleged error. This argument is simply without merit and provides no basis for the Court to undertake review.

First, there is absolutely no indication whatsoever that the Court of Appeals did not employ a de novo standard in the instant case. As stated earlier, both Mrs. Deramus and JNL in their respective briefs to the Fifth Circuit indicated that the standard of review was de novo. Merely because the Fifth Circuit panel issued an unanimous per curiam affirmance adopting the reasoning of the district court does not support any inference that the Court of Appeals failed to conduct a de novo review.

Second, in her suggestion for rehearing before the Fifth Circuit, Petitioner did not raise this alleged failure to follow the proper standard of review as a ground for reconsideration, and thus, it is waived or procedurally barred. Youakim v. Miller, 425 U.S. 231 (1976); F.T.C. v. Grolier, 462 U.S. 19, 23 n.6 (1983).

Third, the holding of Salve Regina is fairly limited, in that the de novo review "mandate . . . only [applies] in those few cases where the appellate court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." 499 U.S. at 237-38.

Fourth, the facts of Salve Regina involved a full blown trial conducted at the district court level. Because trials are so cumbersome and exhausting on trial judges who have to continuously make evidentiary rulings in their role as fact-finder, the Supreme Court insisted that, on appeal, a de novo standard

was more favored as it would let a panel of appellate judges pause for an "extended reflection" and engage in "reflective dialogue and collective judgment." 499 U.S. at 232. In the case at bar, the lower court did not have to confront the pressures of a trial and was faced only with answering a question as a matter of law on cross-motions for summary judgment; thus, the concerns of Salve Regina are not at play here.

Fifth and most important, is that the Salve Regina Court recognized that "[i]f the [C]ourt of [A]ppeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in an appellate opinion." 499 U.S. at 232-33. Thus, there is no need for the written expression of yet more "reflective judgment" by the Court of Appeals when the district court, as was the case here, was faced with a pure question of law, and in its resolution of the issues, rendered a lengthy and exhaustive opinion on the subject at bar. In fact, even "[i]n a case where the controlling question of state law remains unsettled, it is not unreasonable to assume that the considered judgment of the [C]ourt of [A]ppeals frequently will coincide with the reasoned judgment of the district court." 499 U.S. at 237. Thus, the fact that the Fifth Circuit adopted the lower court's opinion *in toto* is not unreasonable under the circumstances presented here, where the lower court issued such a lengthy opinion thoroughly addressing each and every claim made by Petitioner.

Again, the record does not indicate that the Fifth Circuit failed to make a de novo inquiry; the record indicates that the Fifth Circuit's opinion on the matter coincided with that of the district court, and the per curiam panel also found that Petitioner's claims were meritless.

II.

THE CERTIFICATION ISSUE WAS NOT RAISED IN THE LOWER COURT, AND IS THEREFORE PROCEDURALLY BARRED FROM REVIEW BY THE UNITED STATES SUPREME COURT.

It is a time honored principle that the "Supreme Court will not address issues not raised in the Court of Appeals." F.E.O.C. v. Fair Labor Relations Authority, 476 U.S. 19, 24 (1986); F.T.C. v. Grolier, 462 U.S. 19, 23 n.6 (1983); Canton v. Harris, 489 U.S. 378 (1989) (where a claim was not passed on by Court of Appeals and was not presented to the district court for decision, it would not be considered by the Supreme Court on a writ of certiorari); California v. Taylor, 353 U.S. 553 (1957) (where argument was not briefed nor mentioned in oral argument, it would be considered waived and Supreme Court would not recognize such contention on certiorari). Traditional Supreme Court practices preclude grant of certiorari when the question presented was not pressed or passed on below. United States v. Williams, 504 U.S. 36 (1992).

Thus, the Supreme Court is precluded from granting certiorari on the certification question presented by Petitioner in its Petition for Writ of Certiorari. The Petitioner had at least two opportunities to request certification of a question of law to the Mississippi Supreme Court, and failed on each occasion. Now, out of left field, Petitioner seeks to lodge this colorable claim before the highest Court in the land, without allowing the court below to pass judgment.

Petitioner does not present any reasons justifying the Supreme Court departing from its traditional practice and to

grant the writ, especially when the Petitioner is now seeking, for the first time, certification to the state Supreme Court at such a late stage in the game. *See* Lehman Brothers v. Schein, 416 U.S. 386, 392 (1974) (concurring, Rehnquist, C.J.) (disapproval noted of petitioner who sought certification for the first time at the petition for rehearing in the Court of Appeals because "petitioners s[ought] to upset the result of more than two years of trial and appellate litigation on [the] basis of [that] point"). As a court of review, not one of first view, the Supreme Court will entertain issues withheld until merits briefing "only in the most exceptional cases." Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. ___, ___, 132 L.Ed.2d 400, 408 (1995). The Petitioner cites no exceptional circumstances in this case to justify the Court relaxing the procedural bar here.

In any event, where the failure of the Petitioner to present an issue to the lower court on which she seeks the Supreme Court to grant certiorari, is "brought to [the Court's] attention . . . in respondent's brief in opposition to the petition for certiorari," the Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." E.E.O.C. v. Fair Labor Relations Authority, 476 U.S. 19, 24 (1986). Since JNL has brought to the Court's attention the fact that Mrs. Deramus did not raise in the lower courts the issue of certifying any question to the Mississippi Supreme Court, the United States Supreme Court must find this issue is procedurally barred, and alternatively, not worthy of review.

III.

ALL CIRCUITS UNDERSTAND THAT CERTIFICATION IS DISCRETIONARY, AND THERE IS NO CONFUSION OR CONFLICT AMONG THE CIRCUITS ON THE USE OF CERTIFICATION.

Certification is not obligatory, but is clearly discretionary. Lehman Brothers v. Schein, 416 U.S. 386, 390-91 (1974) (the Court held that "[w]e do not suggest that where there is doubt as to local law and where certification procedure is available, resort to it is obligatory"); Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978) (certification is "not always possible nor . . required"). In the spirit of "cooperative judicial federalism . . . [i]ts use in a given case rests in the sound discretion of the federal court." Lehman Brothers, 416 U.S. at 391. It certainly would not be "cooperative," to require Courts of Appeals to submit virtually all state law questions to the highest state court for resolve. For that reason, certification remains discretionary. In this case, that discretion was not abused, particularly when certification was neither requested by Mrs. Deramus nor suggested by her to the Fifth Circuit that state law was so unsettled as to warrant certification.

Moreover, if the rule were anything but discretionary, federal courts would be encouraged to abdicate their Article III function to be a court of competent jurisdiction, where the federal court's very task is to predict/ interpret how the highest court of that State would decide the question. Houston v. Hill, 482 U.S. 451, 468 (1987) (even if the statute has never been interpreted by a state tribunal, it is the duty of the federal court to exercise its properly invoked jurisdiction). State supreme courts would become dumping grounds for every federal case

in which there was no exact replica in state case law. Barnes v. Atlantic & Pacific Life Ins. Co. of America, 514 F. 2d 704, 705 n.4 (5th Cir. 1975) (we use much judgment, restraint and discretion in certifying; we do not abdicate); Boyter v. C.I.R. Services, 668 F. 2d 1382 (4th Cir. 1981) (we do not care to burden our state counterparts with unnecessary certification requests). Virtually all *Erie*-guesses would become candidates for certification. The "mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." Lehman Brothers, 416 U.S. at 390-91.

Another factor for consideration in the certification equation is that the procedure should not be pursued where it is not expedient. In certain instances, certification "saves time, energy, and resources," Lehman Brothers, 416 U.S. at 391, but in others "it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court." 416 U.S. at 394.[5] In this case, substantial delay

---

5. *See also* Salve Regina, 499 U.S. at 237 n.4 (certification should be pursued where it can be "successfully utilized"); Elkins v. Moreno, 435 U.S. 647, 662 n.16 (1978) (certification desirable where it is an "efficient method for obtaining a ruling from the highest court of the State"); Houston v. Hill, 482 U.S. 451, 471 (1987) (where delay and expense are chief drawbacks in abstention, then only does availability of certification become an important factor); Meredith v. City of Winter Haven, 320 U.S. 228, 237 (1943) (to remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it).

would certainly occur.[6]

Moreover, even upon application for certification by a federal court, the Mississippi "Supreme Court may, in its discretion, decline to answer the questions certified to it." Mississippi Rules of Appellate Procedure, Rule 20.[7] There is no guarantee that the Mississippi Supreme Court would answer a question certified from this case, especially in light of the fact that there was substantial case law which had been previously decided on the duties owed.

A. There is no confusion among the circuits as to certification.

---

6. Until 1994, the State of Mississippi did not have an intermediary state court of appeals. Thus, the Mississippi Supreme Court suffered a backlog of more than three years, and still continues to have a backlog in spite of some of the pressures which the intermediate Court of Appeals has taken off of its shoulders. Under those circumstances, certification of a question would have served only to create additional expenses and delay for the litigants. It would not have saved the time and energy and resources. Moreover, putting needless certified questions only results in pushing back an already crowded appellate docket. Kirchmayr, *Reducing the Appellate Docket*, Mississippi Judicial College News (1996). (Appendix at A1).

7. In its discretion, the Mississippi Supreme Court has declined to answer certified questions before. *See* Jones v. Harris, 460 So. 2d 120 (Miss. 1984) (declining to answer the question presented); Cowan v. Ford Motor Company, 437 So. 2d 46 (Miss. 1983) (declined to answer because matter was previously decided and was not a matter of great public interest presenting any unique or unusual legal problem not already decided). Even in the case which Petitioner trumps as being demonstrative of this alleged "circuit-split" on certification, Colonial Properties, Inc. v. Vogue Cleaners, Inc., 77 F. 3d 384, *opinion after denial of certified question*, 86 F. 3d 210 (11th Cir. 1996), the state court there declined to answer the certified question posed by the Eleventh Circuit.

The Petitioner does a song and dance about how certain circuits may be certifying more questions than other circuits, and on that basis, the Supreme Court needs to clarify when federal courts should certify issues of state law. This is nothing more than a rouse to create the illusion that there is some tension among the circuits and that an issue has percolated to the point where the United States Supreme Court must address it. No such tension exists.

As a general proposition, a federal court is bound to answer a state law question the way a state court would, and has a duty to predict what that may be. Moreover, where a decision turns upon applicable state law, and the state's highest court has not adjudicated the issue, a federal court must determine what decision the highest state court would reach if faced with the issue. Jackson v. Johns-Mansville Sales Corp., 781 F. 2d 394, *cert. denied*, 478 U.S. 1022 (5th Cir. 1986). *See also* Ryans v. Royal Ins. Co. of America, 916 F. 2d 731 (1st Cir. 1986) (federal court can assume that state's highest court would adopt view which, consistent with its precedent, seems best supported by force of logic and better-reasoned authorities); Plummer v. Lederle Laboratories, Div. Of American Cyanamid Co., 819 F. 2d 349 (2nd Cir. 1987) (federal court sitting in diversity must follow law directed by the Supreme Court of the state whose law is found to be applicable, and if there is no direct decision by the highest court of that state, the federal court should determine what it believes that state's highest court would find if the issue were before it); Howell v. Celotex Corp., 904 F. 2d 3 (3rd Cir. 1990) (in diversity cases, federal courts apply substantive law of state in which district court sat; where that law has not been settled by highest court of state, Court of Appeals must predict possible outcome of that court); Morrissey v. Williams Morrow & Co.,

Inc., 739 F. 2d 962 (4th Cir. 1984) (federal court is justified in adopting single-publication rule in diversity defamation action, even though state Supreme Court had not yet faced such issue); Batts v. Tow-Motor Forklift Co., 66 F. 3d 743 (5th Cir. 1989) (diversity courts follow state law on substantive matters not governed by constitution or by federal law; however, court is not required to be prescient, and *Erie* and its progeny require no more of federal court than conscientiously to satisfy its duty to predict how state court will decide question); Hines v. Joy Mfg. Co., 850 F. 2d 1146 (6th Cir. 1988) (same); Giffin v. Summerlin, 78 F. 3d 1227 (7th Cir. 1978) (same); Dabney v. Montgomery Ward & Co., Inc., 761 F. 2d 494 (8th Cir. 1985) (same); Henkin v. Northrop Corp., 921 F. 2d 864 (9th Cir. 1990) (same); Weiss v. United States, 787 F. 2d 518 (10th Cir. 1986) (same); Towne Realty, Inc. v. Safeco Ins. Co. of America, 854 F. 2d 1264 (11th Cir. 1988) (same).

There are no ambiguities, tensions or glaring contradictions among the circuit courts of appeals on this point. Every circuit accepts the general rule of Lehman Brothers that it is within its discretion to decide whether to have a question certified. However, every circuit also understands that it has a duty to follow that state's law where settled or discernible, and it cannot shirk its responsibility where it may have to predict the outcome on any unsettled or partially settled questions of state law. Since "Congress . . . adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount," it would be intolerable to allow a policy which would strip federal courts of "jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine." Meredith v. City of Winter Haven, 320 U.S. 228, 236-37 (1943).

In her certiorari petition, Mrs. Deramus demands that this Court issue a rule essentially requiring certification in all "*Erie*-guess" cases. Any other rule besides Lehman Brothers discretionary standard would be tantamount to forcing the courts to automatically submit virtually every question of state law to that state's highest court because rarely would two factual situations be mirror images. Salve Regina College v. Russell, 938 F. 2d 315, 318 (1st Cir. 1991) (after remand from the Supreme Court, the First Circuit refused to certify questions to Rhode Island Supreme Court as they were "neither necessary nor appropriate" even though the state court had not yet been "faced squarely" with these "unique facts" or a "fact pattern like this one").

It is clear to all circuits that they can certify questions should they so choose, and that certification in some instances can prove helpful, but that there is absolutely no reason to certify where it is reasonably clear what a state court would do in that circumstance. "It would be manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law." Houston v. Hill, 482 U.S. at 471. *See also* VanHaaren v. State Farm Mut. Auto. Ins. Co., 989 F. 2d 1 (1st Cir. 1993) (absent controlling state court precedent, federal court sitting in diversity may certify state law issue to state's highest court or undertake its prediction when course state courts would take is reasonably clear); Watson v. City of New York, 92 F. 3d 31 (2nd Cir. 1996) (certification should be used only when there is a split of authority on issue or when case presents a complex question of state law for which no state authority can be found); Wassall v. DeCaro, 91 F. 3d 443 (3rd Cir. 1996) (federal court was required to do what it predicted Pennsylvania Supreme Court would do, and in making its determination give proper regard to opinions of Pennsylvania's

intermediate courts, policies underlying applicable legal doctrine, current trends in the law, and the decisions of other courts); Roe v. Doe, 28 F. 3d 404 (4th Cir. 1994) (only if available state law is clearly insufficient should federal court in diversity case certify issue to state court); Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co., 958 F. 2d 622 (5th Cir. 1992) (certification to state supreme court is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state); Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F. 3d 370 (6th Cir. 1995) (utilization of certification lies within the sound discretion of the judge, and where Kentucky law was relatively settled, it was unnecessary); Patz v. St. Paul Fire & Marine Ins. Co., 15 F. 3d 699 (7th Cir. 1994) (certification unnecessary where there is no room for serious doubt about how state court would answer question); Starks v. Rent-A-Center, 58 F. 3d 358 (8th Cir. 1995) (certification unnecessary where consumer failed to demonstrate that prior decision by district court was clearly erroneous); Micomonaco v. State of Washington, 45 F. 3d 316 (9th Cir. 1995) (certification useless and inappropriate where state court is no better position than federal court to answer unclear question of state law, and use of certification rests within sound discretion of federal court); In re Fingado, 955 F. 2d 31 (10th Cir. 1992) (certification appropriate where no controlling precedent existed in either New Mexico Supreme Court of New Mexico Court of Appeals); Colonial Properties, Inc. v. Vogue Cleaners, Inc., 77 F. 3d 384, *opinion after denial of certified question*, 86 F. 3d 210 (11th Cir. 1996) (first impression question on Alabama state law can be certified, but there is no guarantee that state supreme court will answer question); Noble v. U.S. Parole Comm'n, 82 F. 3d 1108 (D.C. Cir. 1996) (certification proper where relevant dicta sent mixed

signals).[8]

In addition, the Fifth Circuit is the recognized leader in having engineered the certification procedure, and having had the "greatest experience" with it. 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, 176 (2d ed. 1988) (general practice is to allow parties to request and form question; upon disagreement, the court presents question on its own). In its certification jurisprudence, the Fifth Circuit endorses the view that certification is properly denied when the case is "long in tooth," when it can be disposed of "with confidence," where the "law involved seems clear on its face," and the federal court is "relatively certain of its meaning," even if it is one of first impression, or where certification entails the delay of months. Marston v. Red River Levee & Drainage Dist., 632 F. 2d 466, 468 n.3 (5th Cir. 1980).

The above cases clearly demonstrate that all circuits understand that certification is the better alternative to abstention; however, should a circuit feel that there is sufficient case law to predict how a state court would answer the question, certification is unnecessary. 17A Wright, Miller &

---

8. There is one circuit which seems to have the lion's share of having certified questions, that being the Eleventh Circuit. *See* Roe v. State of Alabama, 68 F. 3d 404 (11th Cir. 1995); Farsian v. Pfizer, 52 F. 3d 932 (11th Cir. 1995); Campbell v. Cutler Hammer, Inc., 996 F. 2d 1164 (11th Cir. 1993); McGuire Oil Co. v. Mapco, Inc., 958 F. 2d 1552 (11th Cir. 1992). However, just because one circuit disproportionately uses the certification procedure, is no justification to change the Lehman Brothers discretionary standard correctly adhered to by all the other circuits. It is equally important to note that no other circuit has states as volatile as Alabama and Florida in its contingency. Thus, one cannot blame the Eleventh Circuit for certifying a few more questions than the other circuits.

Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, 158 (2d ed. 1988); Houston v. Hill, 482 U.S. 451, 468 (1987). While the Supreme Court has encouraged the use of certification as an alternative to abstention, the Petitioner mistakenly believes that this prudent use of certification should be universally extended to apply to all cases involving the divination of state law.

B. Having certified in the recent past a similar question to the Mississippi Supreme Court, and having the benefit of other existing Mississippi case authority, the Fifth Circuit had a more than ample basis to decide the issue of law without resorting to certification.

When "there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion . . . [on] Mississippi law." Rule 20, Mississippi Rules of Appellate Procedure. Thus, where there is controlling precedent, the federal courts have no reason to burden the Mississippi Supreme Court with repetitive questions.

1. Certification in the Recent Past on Question of Duty was Applicable Authority.

This case involves the issue of whether JNL owed a legal duty to warn the Deramuses of a risk JNL neither created nor controlled. The Fifth Circuit had already certified a similar question to the Mississippi Supreme Court in Puckett v. Rufenacht, Bromagen & Hertz, 587 So. 2d 273 (Miss. 1991), and knew from that experience and the guidance provided

therein, how the Mississippi Supreme Court would resolve Deramus' claims. In Puckett, the Fifth Circuit had certified to the Mississippi Supreme Court the questions regarding the existence and/or scope of duties which were allegedly owed by a commodities broker to warn of or protect a customer from risks known to the broker. The Mississippi Supreme Court held that a commodities broker in a nondiscretionary account only owed his customer a duty to properly execute trades as directed by him and did not owe any fiduciary or general negligence duty to intervene and protect or warn against risk within the special knowledge of the broker. Most telling of the duty issue in the instant case is the Mississippi Supreme Court's response to the Plaintiff Puckett's theory that his commodities broker should have gone out of his way to protect him from a peril not created by the Defendant broker:

> If a society is to be free, it must demand of every person who, completely on his own, makes a mistake that he has no legal right to shift from his shoulders onto another's the suffering it causes. In our modern society, en masse we are our brothers' keepers, we pay taxes for schools, highways, public health and hundreds of other public programs. On an individual bases, however, no man should be required by law to pay for what was solely and purely another man's mistake.
>
> It may be morally reprehensible for one man to watch another open a window on the twentieth floor of a skyscraper, climb though it and jumped out, when he could easily have reached out and stopped him. To impose a legal

> responsibility upon the bystander to stop him, however, is an entirely different matter.

Puckett, 578 So. 2d at 278. "The only sin the defendants [commodities brokers] can be accused of committing is standing by while Dr. Puckett committed fiscal hara-kiri." Id. Likewise, while the facts in the case *sub judice* involve an insurance company and a prospective applicant for additional coverage, the reasoning of Puckett is applicable to the question of whether the insurance company has a duty to disclose the results of its underwriting lab tests to the applicant, when the insurance company did nothing to create the HIV virus in Mr. Deramus and where there was no detrimental reliance on the part of Mr. Deramus on an expectation that a life insurance company would safeguard his health.

There was no reason to certify another question on this matter, as clear precedent existed as to how the Mississippi Supreme Court would answer. Judge Wingate, considering Mrs. Deramus' plea in the district court, adopted the above quoted language from Puckett in his opinion, and properly applied it to mean that "where a party does not create or cause the peril, said party is under no obligation to prevent the consequences of the peril." (Petitioner's Appendix at A17). There was no reason for either the district court or the Court of Appeals to certify a question on this point of undertaking duties, as it had been certified before in a similar context, and the answer of the Mississippi Supreme Court left little room for doubt.

2. Clear and controlling precedent existed in Mississippi case law on the duty to disclose.

In addition to Puckett, the Mississippi Supreme Court

had already made several pronouncements on each of the Plaintiff-Petitioner's legal theories for liability, as relied upon and closely followed in the district court's opinion and the Court of Appeals affirmance of the district court's opinion. In addition to the Mississippi authorities cited in the district court's opinion, the Fifth Circuit had before it the reasoning of the Mississippi Supreme Court in Long v. Patterson, 22 So. 2d 490 (Miss. 1945), wherein the court faced a similar duty question, and flatly refused to recognize such a duty:

> Is there a duty imposed by law upon any person to warn another of an approaching or impending danger to the latter, when the person sought to be charged had or has nothing to do with putting into operation, or with the continuance in operation of, the dangerous agency which approaches? Whatever we might think of this as a moral proposition, it is a question to which the settled law gives a negative answer. As stated in the Restatement, Vol. 2 Torts, sec. 314, "the actor's realization that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action". And an illustration is given as follows: 'A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from doing so by word or touch without delaying his own progress. A does not do so and B is run over and hurt. A is under no duty to prevent B from stepping into the street and is not liable to B'. But the rule is otherwise where the actor undertakes to render such service, although

> gratuitously, and the other person relies on the performance of the undertaking.

Long, 22 So. 2d at 492. This has long been the law, and there has been no intervening case law propounded by the Mississippi Supreme Court to say any differently. Indeed, the Mississippi Supreme Court has underscored that nonphysicians are not held to the duty otherwise expected of physicians to warn or protect others from adverse health conditions. Foster v. Bass, 575 So. 2d 967 (Miss. 1990) (refusing to impose a duty on Catholic Charities for failing to ensure that a child placed through its adoption agency had been tested for Phenylketonuria and refusing to hold it liable for failing to warn that the child was at risk, as Catholic Charities was not a physician, and could not have the duties and standard of care regarding physicians imputed to it). Of course, this was the very duty the instant Plaintiff-Petitioner sought to have imposed by the courts below.

There was more than ample authority under Mississippi law for the Fifth Circuit to rely upon in affirming the holding of the district court without certifying a question *sua sponte* to the Mississippi Supreme Court. In light of the particular authority of Long, Puckett, and Foster, JNL did not have a duty under Mississippi law to tell Mr. Deramus, and most certainly not others, such as his wife, about the results of his blood tests. Had JNL undertaken to tell him, then JNL would have exposed itself to liability should the results have been a false positive. The test results run by JNL were for its own underwriting purposes; the record is crystal clear that Mr. Deramus in no way relied upon JNL to safeguard the condition of his health. The fact that Mr. Deramus' HIV infection was not otherwise medically diagnosed for another eighteen months is hardly JNL's fault. During this period, Mr. Deramus attended to his own health by seeking the

care of numerous physicians of his own choosing.

The duty question is the central issue in this case, not the rate of certification among the various circuits. Petitioner never argued that the ultimate holding of either the Fifth Circuit or that the district court was clearly erroneous, wrong, or unjust, or that the outcome would have been different had the issue been decided by the state court. As Petitioner has failed to even address a contention that certification would have produced a different result, the argument that a question should have been certified is nothing more than an academic exercise.

C. The Petitioner contradicts herself and advances a theory on appeal inconsistent with that argued in the lower courts, and is therefore, procedurally barred.

Petitioner is the one who first filed a motion for summary judgment in district court. There, she advanced four theories of liability on which JNL had a duty to disclose the results of the HIV test. On each one of these grounds, Plaintiff-Petitioner argued that the law in Mississippi was clear and that it was unequivocally in her favor. Upon losing her summary judgment motion in district court, she appealed to the Fifth Circuit Court of Appeals.

In her brief to the Fifth Circuit, Petitioner claimed that "[u]nder **longstanding** and **well-developed case law** in Mississippi and elsewhere, the existing commercial relationship between [the parties] . . . constituted a special or confidential relationship that imposed a higher standard duty of disclosure," (Appellant's Brief at 10), and that "**[s]ound public policy** and **established precedent** [warranted] the duty of disclosure,"

(Appellant's Brief at 11), and that "there [wa]s a substantial basis to reverse the Erie-guess of the District Court as to the extent of the duty imposed upon [JNL] under Mississippi law, so as [to create a jury] question." (Appellant's Brief at 13-14) (emphasis added). The appellant even conceded that "the precise fact situation raised here has not been the subject of prior reported decisions in Mississippi, but **there is a substantial body of case law** that reflects 'the more cogent reasoning of the best and most wide-spread authority' from around the country as to the imposition of a duty in similar circumstances. **Both in Mississippi and elsewhere**, duties have been found to exist and to provide the bases for jury consideration." (Appellant's Brief at 14) (emphasis added). Appellant again stated that the "**Mississippi Supreme Court . . . ha[s] had numerous opportunities to develop the law** for the imposition of duties in [this] state." (Appellant's Brief at 14) (emphasis added). In summation, appellant stated that "[i]t is entirely consistent with the **extensive jurisprudence in Mississippi to impose liability** on [JNL] for its failure to speak." (Appellant's Brief at 23) (emphasis added). In the suggestion for rehearing, Appellant-Petitioner again did not change her posture, and stated that "**Mississippi jurisprudence contains numerous examples** in which . . . to compel disclosure [between two parties]." (Appellant's Rehearing Brief at 12) (emphasis added). This list of quotes is not exhaustive by any means. At each and every turn, she argued that the law was clear to the district court, and to the Court of Appeals, that the law was clear and that the district court had just made an incorrect *Erie*-guess. Not only did Appellant-Petitioner **never** suggest certification to either the district court or the Court of Appeals, due to her insistence about her position being clearly defined in Mississippi law, the Fifth Circuit had no reason to *sua sponte* certify any questions.

However, at this juncture, Petitioner, dissatisfied with the results in each of the lower courts, comes before this Court and argues the complete opposite of what she has been saying all along. Now she states that the law was unclear, ambiguous, and unsettled, and therefore, the issues or questions should have been certified to the Mississippi Supreme Court, as the Fifth Circuit "charg[ed] ahead with speculative answers on broadly important and unsettled issues of state law and public policy." (Petitioner's Petition for Writ of Certiorari at 18). "The purpose of certification is to ascertain what the state law is, not . . . to afford a party an opportunity to persuade the court to say something else." Tarr v. Manchester Ins. Corp., 544 F. 2d 14, 15 (1st Cir. 1976). Mrs. Deramus' changing of the masks is highly disingenuous. This maneuver is nothing more than a desperate ploy for another opportunity to persuade a different court to say something else.

It is a well settled principle that where an appellant pursues conflicting and alternating legal theories on appeal as opposed to in the lower courts, such is procedurally barred. Capps v. Humble Oil & Refining Co., 536 F. 2d 80 (5th Cir. 1976) (a party cannot raise a new theory on appeal that was not presented to the court below); Alexander v. Town & Country Estates, Inc., 535 F. 2d 1081 (8th Cir. 1976) (appellate court will not decide case on legal theory directly contrary to that advanced by appellants at trial); Kassman v. America University, 546 F. 2d 1029 (D.C.Cir. 1976) (litigative theories not pursued in the trial court ordinarily will not be entertained in an appellate tribunal, and questions not properly raised and preserved will normally be spurned on appeal); Universe Tankships, Inc. v. United States, 528 F. 2d 73 (3rd Cir. 1975) (different theory of recovery may not be urged on appeal where prejudice would result to other party); Browzin v. Catholic

University of America, 527 F. 2d 843 (D.C.Cir. 1975) (where plaintiff tries his case on one theory in the district court, without any indication of other theories, he will not ordinarily be heard to press those other theories on appeal). In that vein, Petitioner should be barred from doing an about-face and initiating an argument that Mississippi law on the subject is so unclear as to mandate certification.

CONCLUSION

Despite the unfortunate circumstances surrounding the AIDS-caused death of Frank Deramus, JNL bears no liability in this instance as a matter of Mississippi law. The district court found this to be the case, as well as the United States Court of Appeals for the Fifth Circuit in a de novo review of the district court's reasoning. Displeased with these results, Petitioner now seeks to upset over four years of litigation by asking this Honorable Court to review an issue never addressed by the lower court. Moreover, the certification jargon exposes the inherent contradictions in her request for certiorari, as her current basis for review is in direct conflict with that which she argued to the lower courts. Therefore, the issue of whether a question should have been certified to the Mississippi Supreme Court is barred. While Petitioner has parroted the circuit split criteria for certiorari review by this Court, the alleged inequality among the circuits on rate of certification is not only unfounded, but is hardly of consequence. It is clear that certification is a discretionary matter, has always been a discretionary matter, and in all wisdom and prudence, should always be discretionary, world without end. Furthermore, considering the backlog in the docket of the Mississippi Supreme Court, certification is neither expedient, nor does it guarantee an answer from the state court.

Lastly, the established state law in Mississippi simply will not recognize the claim that the Petitioner has asserted on the merits; accordingly, Petitioner never argues that certification would produce a different result. There is no issue which the Petitioner presents that warrants review by this Court.

FOR THE FOREGOING REASONS, the Respondent respectfully requests that United States Supreme Court deny writ of certiorari in the present case.

Respectfully Submitted,

D. COLLIER GRAHAM, Esq.
Counsel of Record
EUGENE NAYLOR
DEBBIE GOSWAMI
Shell, Buford, Bufkin, Callicutt & Perry
920 Trustmark Building
P.O. Box 157
Jackson, MS. 39205

Dated: January 13, 1997.

MISSISSIPPI JUDICIAL COLLEGE NEWS
Vol. VII, Number 3
Winter 1996

REDUCING THE APPELLATE BACKLOG

By: Steven Kirchmayr,
Court Administrator
Mississippi Supreme Court

For at least fifteen (15) years, appeals to the Supreme Court have steadily increased causing a backlog of cases as well as unacceptable delays in the disposition of cases. The Justices of the Supreme Court, with the support of the bar, brought the appeal backlog/delay problems to the attention of the legislature. In response to the concerns presented, the Mississippi Legislature created the Court of Appeals as well as a new appellate structure. The Judges of the Court of Appeals took office in January, 1995 and immediately began considering cases. The question now is: "What progress has been made in reducing the backlog of appellate cases?"

Prior to 1995, there were more new appeals being filed than dispositions reached in cases. However, during the calendar year 1995, the combined efforts of the Supreme Court and the Court of Appeals resulted in more cases being disposed of than new appeals filed. In 1995, one thousand, three hundred and eighty (1,380) cases were disposed of while one thousand, one hundred and thirty-eight (1,138) new appeals were filed.

Statistics gathered so far in 1996, from January through October, show that nine hundred and sixty-seven (967) new appeals have been filed this year, and that the combined efforts of the Supreme Court and the Court of Appeals have disposed of one thousand, one hundred and eighty-one (1,181) cases, an average of one hundred and eighteen (118) cases per month.

While maintaining its caseload, the Supreme Court has acquired additional duties relating to the new appellate structure. The Court now screens all appeals filed in the Supreme Court to determine which are appropriate for assignment to the Court of Appeals and which should be retained by the Supreme Court. The Supreme Court must also decide whether to review a decision of the Court of Appeals when a party seeks review in the Supreme Court by filing a petition for writ of certiorari.

Of the one hundred and seventeen (117) petitions for certiorari which have been filed in the Supreme Court this year, the Court has disposed of one hundred (100), granting fifteen (15) and denying eighty-five (85). Only seventeen (17) petitions for certiorari were pending before the Court at the end of October.

So far this year, the number of motions filed in the Supreme Court, excluding motions for time, was two thousand, five hundred and fourteen (2,514), and the Supreme Court had disposed of two thousand, six hundred and sixty-eight (2,668) motions.

In the years preceding 1995, the number of cases pending at the end of each year in the Supreme Court steadily increased. Since 1995, however, the number of pending cases had decreased by two hundred and thirty-three (233) cases. By October of this year, the number of pending cases had further decreased by two hundred and fourteen (214) cases.

Hard work by the justices of the Supreme Court and the judges of the Court of Appeals has made the significant reduction in the backlog of cases in the past twenty-two (22) months possible. All of the justices, judges, lawyers, and legislators who participated in planning and creating the new appellate structure have every right to be extremely pleased, because the backlog of appellate cases should be nonexistent at the end of the next twenty-two (22) months.

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-947

In The

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE STATE OF MISSISSIPPI IN SUPPORT OF PETITIONER

MIKE MOORE
Attorney General
State of Mississippi

RICKEY T. MOORE*
Special Assistant
Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Counsel for Amicus Curiae

* *Counsel of Record*

January 13, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

JUSTIFICATION FOR GRANTING THE WRIT..... 1

The Compelling State Interest..... 1

Statutes and Regulations Requiring Reporting.... 3

The Fifth Circuit Did Not Comply With *Erie* Requirements 6

The Fifth Circuit Did Not Comply With *Salve Regina* Requirements..... 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Atlantic & Pacific Life Ins. Co., 514 F.2d 704 (5th Cir. 1975) 9

Belloti v. Baird, 428 U.S. 132 (1976) 8

Clay v. Sun Insurance Office, Ltd., 363 U.S. 207 (1960) 7

Colorado River Water Conservation District v. U.S., 424 U.S. 800 (1976) 8

Erie R. Co. v. Tompkins, 304 U.S. 64 (1935) 6, 9

Hanna v. Plumer, 380 U.S. 460 (1965) 10

Kennington-Saenger Theaters v. State, 18 So.2d 483 (Miss. 1944) 1

Lehman Brothers v. Schein, 416 U.S. 386 (1974).....7, 8

Mosher v. Speedstar Div. Of AMCA Intern., Inc., 52 F.3d 913 (1995) 8

Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874) ...6, 7

Salve Regina College v. Russell, 499 U.S. 225 (1991) 9, 10, 11

Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1254, 131 L.Ed.2d 134 (1995)..... 9

Toner v. Lederle Laboratories, 779 F.2d 1429 (9th Cir. 1986)..... 8

Walters v. Inexco Oil Co., 670 F.2d 476 (5th Cir. 1982)..... 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1652 6

Miss. Code Ann. § 41-23-1(1) (1972) 3

Miss. Code Ann. § 41-23-1(6) (1972) 4

Miss. Code Ann. § 41-23-1(7) (1972) 4

Miss. Code Ann. § 41-23-1(9) (1972) 4

Miss. R. App. Proc. 20 7

OTHER

17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248 (1978) 8

STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Mississippi, through its Attorney General, Mike Moore, respectfully submits this *amicus curiae* brief in the above styled matter pursuant to Rule 37.4 of the Supreme Court Rules. The Office of the Attorney General, created by Article 6, Section 173 of the Mississippi Constitution of 1890, is entrusted with management of all legal affairs of the state including the authority to manage and control all litigation necessary for enforcement of state laws and protection of public rights. *Kennington-Saenger Theaters v. State*, 18 So.2d 483, 486 (Miss. 1944). The public policy issues raised in this matter are of paramount importance to the public health and safety of the citizens of Mississippi. The federalism issues raised by this case, as underscored by an apparent split in the circuit courts of appeal, require this Court to give definitive guidance with regard to the appropriate use of certification procedures.

JUSTIFICATION FOR GRANTING THE WRIT

The Compelling State Interest

The control, treatment, and prevention of communicable diseases is of paramount importance to the several states. Of the numerous communicable diseases that afflict the citizens of this country, none are more insidious, deadly, or costly than the human immunodeficiency virus (hereinafter referred to as "HIV"). Clinical manifestation of disease as a result of HIV occurs when one or more opportunistic diseases occur in the presence of the

virus, referred to as acquired immunodeficiency syndrome (hereafter referred to as "AIDS").

Mississippi is a very rural state. A little more than half of Mississippi's counties have a population of 25,000 or less, with only 10 of its counties having a population greater than 60,000. Mississippi has four standard metropolitan statistical areas which include seven of its 82 counties. Statistics reveal that over 52% of the state's population live in rural areas. All of Mississippi's 82 counties, or parts thereof, are medically underserved, and 54 of the 82 counties are designated as health professional shortage areas.

As compared to many other states, Mississippi's citizens are poor, under-educated, under-employed, and relatively unhealthy. While there are no definitive explanations for these conditions, it is reasonable to surmise that none exist independently of the others, and that comprehensive social, economic and health programs are needed to correct them.

The conservative, religious nature of Mississippians compounds other environmental difficulties in that discussions of HIV infection and AIDS are rarely conducted in frank, open forums. Scientifically verified interventions are often prohibited because they appear to give implicit permission to the behaviors they seek to modify or in which they attempt to reduce the level of harm.

Obviously, all this means that HIV infection and AIDS are even more difficult issues to address in Mississippi than in other states. It is of paramount importance that all persons with diagnostic information regarding a

communicable disease report such information to the State Department of Health.[1]

Statutes and Regulations Requiring Reporting

The state has enacted legislative and regulatory reporting requirements in an effort to ensure that certain communicable diseases are reported. Despite the efforts of the state legislature and the State Board of Health, problems continue to exist with the reporting of communicable disease, particularly where out-of-state laboratories are involved. The sufficiency of state statutes and regulations mandating reporting should be determined by the Mississippi Supreme Court, the only court constitutionally empowered to do so. Moreover, the far-reaching determination of whether or not an insurance company, or any other person with knowledge of a communicable disease, has a duty to report such information to an affected citizen of Mississippi should be determined by the Mississippi Supreme Court.

Miss. Code Ann. § 41-23-1(1) (1972) charges the State Board of Health with the duty to promulgate rules and regulations defining and classifying communicable diseases and other diseases that are a danger to health and

---

[1] The intervention process initiated by the Department of Health is detailed, exhaustive, and tailored to the specific disease in question. At the risk of over-simplification, the Department's intervention programs are designed to prevent the spread of communicable disease through diagnosis, treatment and education. In the case *sub judice*, the Petitioner would have been contacted by Department staff as a routine part of the intervention process.

to provide for a procedure for reporting, monitoring and prevention of such diseases. Subsection (4) of the same section charges every practicing or licensed physician, or person in charge of a hospital, health care facility or laboratory, with the responsibility of reporting immediately to the State Board of Health every case of a reportable communicable disease.

The importance of reporting communicable diseases is underscored by *Miss. Code Ann. § 41-23-1(6) (1972)* wherein a physician who breaches his duty to report is subject to suspension of his license to practice medicine. Moreover, *Miss. Code Ann. § 41-23-1(7) (1972)* makes the failure to report a communicable disease a crime subject to a monetary fine and confinement in the county jail. *Miss. Code Ann. § 41-23-1(9) (1972)* requires that persons who receive notification of the infectious condition of an individual hold such information in the strictest of confidence and privilege and not reveal the information to others, and take only those actions necessary to protect the health of the infected person or other persons where there is a foreseeable, real, or probable risk of transmission of the disease.

Pursuant to the aforementioned code sections, the Mississippi State Board of Health has adopted its *Rules and Regulations Governing Reportable Diseases* (hereafter referred to as the "Regulation"). Section I of the 1985 version of the Regulation, in effect at the time Mr. Deramus made application to Jackson National Life, provided in part as follows:

> Each physician, including each pathologist, dentist, and nurse, as well as the superintendent, administrator, or other person in charge of any

> hospital, institution, school or day care center shall report to the State Department of Health any case or suspected case of communicable or reportable disease, including those hereinafter listed, which he is attending, has examined, or of which he has knowledge. Such report shall include, unless otherwise specified, the patient's name, address, age, race, sex, the disease or suspected disease and the date of onset of the disease.

Acquired Immunodeficiency Syndrome (AIDS) was included among the diseases of public health importance to be reported. Section V of the Regulation provided in part as follows:

> It shall be the duty of the director or any other person in charge of any clinical laboratory in the State of Mississippi to notify the Mississippi State Department of Health, Jackson, by forwarding within 24 hours a copy of any laboratory report which is considered diagnostic of **or indicative of the diagnosis of a reportable disease** . . . (emphasis added).

In order to prevent communicable diseases the appropriate state agency, which in Mississippi is the State Department of Health, must have access to information regarding diagnosis of such disease. Moreover, it is necessary that persons infected with a communicable disease be apprised of his condition to minimize the possibility of infecting persons with whom he comes in contact. Toward this end, the State Board of Health promulgated and has revised the Regulation several times in an attempt to ensure that all health care providers, or other persons with diagnostic information, report such information.

Because of the compelling state interest in adequate, timely reporting of information regarding communicable diseases, any questions arising regarding the interpretation of state statutes or regulations promulgated pursuant to those statutes should be decided by the Mississippi Supreme Court. Likewise, because of the grave impact on the citizens of the state, the application of tort law to facts surrounding the failure to report information regarding communicable diseases, should be decided ultimately by the Mississippi Supreme Court. It is simply inappropriate for a federal court, sitting as a result of jurisdiction based on diversity, to decide public policy matters of such importance.

The Fifth Circuit Did Not Comply With *Erie* Requirements

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1935) the Supreme Court recognized that "[t]here is no federal general common law." *Id.* at 78. *Erie* requires federal courts sitting in diversity to follow the law laid down by the respective state courts, so long as those precedents are constitutional, consistent with statutory provisions, and do not interfere with the power granted to federal courts.[2] *Erie*, when read with *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874), ensures that the decisions of state

---

[2] *See also* 28 U.S.C. Section 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply").

courts will be respected by federal courts sitting in diversity.[3]

Despite the possibility of making an incorrect "*Erie*-guess" on a matter of compelling importance to the State of Mississippi and to its individual citizens, the Fifth Circuit simply affirmed, without comment, the findings of the district court. In so doing, the Fifth Circuit violated two principles set down by this Court. This Court has long encouraged the use of certification procedures to resolve unsettled state law questions. *See, e.g., Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960). The court of appeals also failed to follow this Court's requirement for a *de novo* review of the trial court's findings.

Under Mississippi rules, the Fifth Circuit could have certified the question to the Mississippi Supreme Court. *See Mississippi R. App. Proc. 20.* Without explanation, however, the circuit court of appeals simply entered a PER CURIAM order affirming the judgment of the district court "on the basis of the district court's Memorandum Opinion and Order attached hereto."

The public policy and individual rights decided by the federal courts in this matter are too important for an "*Erie*-guess." Unsettled questions of state law, particularly those involving important public policy issues, should be decided by the appropriate state court. In this case, the Mississippi State Supreme Court is the only court with the constitutional jurisdiction to make the call. *See, e.g., Lehman Brothers v. Schein*, 416 U.S. 386, 391

---

[3] In *Murdock*, this Court suggested that it would not concern itself with revisiting issues of state law.

(1974); *See also Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814 (1976) (discussing abstention by federal courts, "in a case and in similar cases [which would] be disruptive to state efforts to establish a coherent policy with respect to a matter of substantial public concern.").

This Court stated in *Lehman Brothers*, 416 U.S. at 391, that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." See also *Belloti v. Baird*, 428 U.S. 132 (1976). The vast majority of states, like Mississippi, have procedures for the certification, from federal courts, of questions of unsettled law.

Several circuits appear to have embraced this Court's instruction. In *Toner v. Lederle Laboratories*, 779 F.2d 1429 (9th Cir. 1986), the Ninth Circuit recognized that "[c]ertification provides a means to obtain authoritative answers to unclear questions of state law." *Id.* at 1432, citing 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248, at 520 (1978). The Eleventh Circuit noted in *Mosher v. Speedstar Div. Of AMCA Intern., Inc.*, 52 F.3d 913 (1995) that:

> . . . [Certification] is a useful adjudication tool. Only through certification can federal courts get definitive answers to unsettled state law questions. Only a state supreme court can provide what we can be assured are "correct" answers to state law questions, because a state's highest court is the one true and final arbiter of state law. From our perspective, state law is what the state supreme court says it is, and a state supreme court's pronouncements are binding on every state and federal judge.

Id. at 917, citing *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11th Cir. 1994) (en banc) (Carnes, J., dissenting), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1254, 131 L.Ed.2d 134 (1995).

In light of earlier decisions by the Fifth Circuit embracing the use of certification procedures, the failure to rely on the Mississippi Supreme Court to resolve this unsettled question is inexplicable. *See, e.g., Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975); and *Walters v. Inexco Oil Co.*, 670 F.2d 476 (5th Cir. 1982). The outcome of this case is too important to be decided by an "*Erie*-guess". In a matter of such grave public policy importance, principles of cooperative federalism demand that the unsettled questions undergirding this controversy be decided by the only court with the constitutional wherewithal to do so, the Mississippi Supreme Court.

The Fifth Circuit Did Not Comply With *Salve Regina* Requirements

On appeal of the trial court's disposition of this case, the Fifth Circuit panel affirmed by simply holding "[t]he judgment of the district court is affirmed on the basis of the district court's Memorandum Opinion and Order attached hereto." This Court concluded in *Salve Regina College v. Russell*, 499 U.S. 225 (1991) that "a court of appeals should review *de novo* a district court's determination of state law." *Id.* at 231. The principles of the *Erie* doctrine, "the discouragement of forum-shopping and avoidance of inequitable administration of the laws" are advanced by independent appellate review. *Id.* at 234,

citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Concluding the holding in *Salve Regina*, this Court stated, "[t]he obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeal review the state-law determinations of the district courts *de novo*." *Id.* at 239. The affirmance of the district court's determination fails to comply with this Court's charge.

CONCLUSION

The State of Mississippi has a compelling interest in the public policy issues at stake in this case. Likewise, important private rights of its citizens are at issue. The unsettled law at the heart of this case should have been certified to the Mississippi Supreme Court. By utilizing the certification procedure provided for by the *Mississippi Rules of Appellate Procedure*, the Fifth Circuit could have avoided the possibility of affirming an incorrect "*Erie*-guess" by the district court. Moreover, the Fifth Circuit failed to follow the requirements for appellate review laid

down by this Court in *Salve Regina*. Based on the foregoing, the State of Mississippi urges that the lynchpin questions underlying this controversy be decided by the Supreme Court of Mississippi.

Respectfully submitted,

MIKE MOORE
Attorney General
State of Mississippi

RICKEY T. MOORE*
Special Assistant
Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Counsel for Amicus Curiae

* *Counsel of Record*

January 13, 1997

Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

NO. 96-947

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JODY H. DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,
Petitioner

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF TEXAS, THE STATE OF DELAWARE, THE STATE OF LOUISIANA, THE STATE OF NORTH DAKOTA, AND THE STATE OF SOUTH DAKOTA AS AMICI CURIAE SUPPORTING PETITIONER

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

THOMAS P. PERKINS, JR.
Counsel of Record for Amici States
Chief, Consumer Protection Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2185

7 pp

LIST OF COUNSEL

Counsel for the State of Delaware

M. JANE BRADY
Attorney General
820 North French Street
6th Floor
Wilmington, Delaware 19801
(302) 577-2500

Counsel for the State of Louisiana

RICHARD P. IEYOUB
Attorney General
P. O. Box 94095
Baton Rouge, Louisiana 70804
(504) 339-4190

Counsel for the State of North Dakota

HEIDI HEITCAMP
Attorney General
600 East Boulevard Avenue
Bismark, North Dakota 58505-0040
(701) 328-2210

Counsel for the State of South Dakota

MARK BARNETT
Attorney General
500 East Capital Avenue
Pierre, South Dakota 57501-5070
(605) 773-3215

NO. 96-947

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JODY H. DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,
Petitioner

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE STATES OF TEXAS ET AL. SUPPORTING PETITION FOR A WRIT OF CERTIORARI

The State of Texas by its Attorney General Dan Morales, the State of Delaware by its Attorney General M. Jane Brady, the State of Louisiana by its Attorney General Richard P. Ieyoub, the State of North Dakota by its Attorney General Heidi Heitcamp, and the State of South Dakota by its Attorney General Mark Barnett (the "Amici"), respectfully submit this brief as Amici Curiae in support of the petition for a writ of certiorari.

INTERESTS OF THE AMICI

The Petition in this case raises the issue of whether certification procedures, allowing federal appellate courts to obtain authoritative rulings by the highest state courts on

important matters of state law, should be preferred over the *Erie*-guess method when state law issues are presented in cases before the federal courts.

Each of the Amici is a state which has adopted provisions for the certification by federal courts of state law issues to their respective supreme courts. The Amici have compelling interests in the effective use of their state law certification procedures, not only as a matter of comity and to protect the authority and competence of their respective judicial systems, but also to avoid incorrect and confusing speculation by federal courts as to the substance of state law. As this Court has recognized, "[i]n a Federal system, it is obviously desirable that questions of law which . . . are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts." *Elkins v. Moreno,* 435 U.S. 647, 662 n. 16 (1978). The Amici take no position on the merits of the Petitioner's underlying claims for damages against the Respondent insurance company or on the substance of Mississippi law.

STATEMENT OF THE CASE

As the result of a routine physical examination in connection with an application for life insurance, the Respondent insurance company discovered that Petitioner's husband was infected with the AIDS virus (HIV). Respondent informed over 600 other companies, through the Medical Information Bureau, of the husband's abnormal blood test. However, it did not alert the couple or the husband's doctor of the HIV-positive finding; nor, apparently, were state health authorities notified. Only a year and a half later, after the husband had fallen severely ill, did the couple learn from a hospital in Maryland of the nature of his disease.

The husband died of AIDS complications less than two years later. After his death, Petitioner brought suit against Respondent in the state court of Mississippi, where the couple

had lived, seeking redress for herself and for the husband's estate for the company's failure to inform them of his AIDS infection in a timely manner.

Based on diversity of citizenship, Respondent removed the case to the U.S. District Court for the Southern District of Mississippi, which granted the company's motion for summary judgment and dismissed the action with prejudice. The district court held that, because the state courts had never ruled definitively as to an insurance company's duty of disclosure in such circumstances, it was required to make "an *Erie*-guess as to how the Mississippi Supreme Court would rule." In doing so, the federal court concluded that Mississippi law did not subject Respondent to liability for failing to disclose the results of the husband's blood test. On appeal, the Fifth Circuit accepted the "*Erie*-guess" and affirmed "on the basis of the district court's Memorandum and Order attached hereto" without further explanation or comment. *Deramus v. Jackson National Life Insurance Company*, 92 F.3d 274 (5th Cir. 1996) (per curiam).

CONSIDERATIONS FAVORING REVIEW

This case presents an opportunity for the Supreme Court to clarify and underscore the importance of state law certification in our system of "cooperative judicial federalism."

The Court has repeatedly employed the certification procedure and has strongly endorsed it for use by lower federal courts in appropriate cases. *E.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 396-96 (1988) ("Certification, in contrast to the more cumbersome . . . abstention doctrine, is a method by which we may expeditiously obtain [authoritative] construction" of a challenged state law by the Supreme Court of the state); *Elkins v. Moreno*, 435 U.S. at 662 n.15 ("availability of an adequate certification procedure 'does, of course, . . . save time, energy, and resources and helps build a cooperative judicial federalism.'"), quoting *Bellotti v. Baird*, 428 U.S. 132 at

150-51 (1976); *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974).

The Amici are concerned, however, that the federal courts of appeals are still using the "*Erie*-guess" approach to decide important state law issues which arise in cases over which the federal courts have jurisdiction, as exemplified in this case.

This appears to be an appropriate time for the Court to consider whether the federal courts of appeals should presumptively use certification to the Supreme Court of a state to resolve uncertain issues of state law whenever the procedure is available. A federal court hearing private civil litigation should not await an affirmative request by one of the parties before certifying an issue to state court, as the state and public interests at stake — including the state's interest in having its own courts decide important matters of state law — often far transcend the interests of any particular party. (Indeed, in each such case at least one of the sides has already concluded, in an original pleading or by removal, that its private interest lies in selecting a federal forum.) Certification should be ordered as a matter of course on important issues of state law which the state courts have not yet addressed or resolved; however, if the federal court decides as a matter of discretion in a particular case that the matter should *not* be certified, its specific reasons (such as an extraordinarily urgent need for prompt disposition of the case) should be stated on the record.

CONCLUSION

The Amici respectfully urge the Court to grant the Petition for a writ of certiorari to the Fifth Circuit. On review, the Court should hold that, where a certification procedure has been made available by the state, there is a rebuttable presumption in favor of certification to obtain an authoritative determination by the state Supreme Court when a federal court of appeals is faced with important and unsettled issues of state law, especially

where they implicate critical public health and public policy concerns of the state, such as those raised in this case.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

THOMAS P. PERKINS, JR.
Attorney of Record
Chief, Consumer Protection Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2185

Counsel of Record for Amici States

Supreme Court, U.S.
FILED
JAN 28 1997
CLERK

No. 96-947

IN THE

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Reuben B. Robertson III
Counsel of Record
James F. Flug
INGERSOLL AND BLOCH
1401 Sixteenth St., N.W.
Washington, DC 20036
(202) 232-1015
Attorneys for Petitioner

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Reply Brief Supporting Petition 1

1. There is no jurisdictional bar to accepting this case for review 1

2. The Fifth Circuit's decision of an important issue of Mississippi law by "*Erie*-guess", instead of certifying it to the state's Supreme Court, is appropriate for review 2

3. Petitioner has not improperly "switched horses" in this case 3

4. Respondent repeatedly misstates Petitioner's position on certification 4

5. The court of appeals did not conduct *de novo* review, and Petitioner did not waive her right to appellate review under that standard 5

6. Any misrepresentations of the record have come from Respondent, not Petitioner 6

7. Respondent's professed concern over the docket of the Mississippi Supreme Court is misplaced 9

Conclusion 9

TABLE OF AUTHORITIES

Cases ***Pages***

Andrus v. Charleston Stone Products Co.,
436 U.S. 604 (1978) 1

Carlson v. Green, 446 U.S. 14 (1980) 1

Clay v. Sun Insurance Office, Ltd.,
363 U.S. 207 (1960) 2

Elder v. Holloway, 510 U.S. ___,
127 L.Ed. 2d 344 (1994) 3

Elkins v. Moreno, 435 U.S. 647 (1978) 2

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 1, 2

FTC v. Grolier, Inc., 462 U.S. 19 (1983) 6

Salve Regina College v. Russell,
499 U.S. 225 (1991) 5

Sibbach v. Wilson & Co., 312 U.S. 1 (1940) 1

Swift v. Tyson, 16 Pet. 1 (1842) 2

Youakim v. Miller, 425 U.S. 231 (1976) 1, 6

Rules and Statutes

28 U.S.C. § 1254(1). 1

Mississippi Rules of Appellate Procedure,
Rule 20 9

Other Authorities

17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248 (2d ed. 1988) 2

S. Kirchmayr, "Reducing the Appellate Backlog," Mississippi Judicial College News, Vol VII, No. 3 (Winter 1996) 9

REPLY BRIEF SUPPORTING PETITION

Petitioner Jody Deramus respectfully submits this brief in reply to Respondent's Brief in Opposition ("Opp."), filed on behalf of Jackson National Life Insurance Company. The State of Mississippi has filed a brief as *amicus curiae* supporting the petition ("Mississippi Amicus Br."), as did the State of Texas and several other states.

1. There is no jurisdictional bar to accepting this case for review. Respondent argues that jurisdiction here is lacking because certification to the state Supreme Court was not requested below. (Opp. 2). That is simply incorrect as a matter of law. 28 U.S.C. § 1254(1) grants the Supreme Court broad jurisdiction to hear any case from a federal court of appeals on writ of certiorari, and there are no statutory restrictions on the exercise of discretion under that grant.

Generally, of course, questions presented in this Court should be raised and considered below. But this rule is prudential, not jurisdictional; there are numerous situations where the Supreme Court has exercised its discretion to address and decide matters not raised by any party in the courts below. See, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980)("important, recurring issues" of relationship between *Bivens* and FTCA remedies addressed to serve "the interests of judicial administration"); *Andrus v. Charleston Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978)(subject matter jurisdiction always open to review by the Court *sua sponte*, even if not raised below); *Youakim v. Miller*, 425 U.S. 231 (1976)(decision vacated, case remanded to consider conflict between state and federal statutes under Supremacy Clause theory not previously advanced); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1940)(plain error may be corrected although not raised on appeal). Even the vitally important holding in *Erie*

R. Co. v. Tompkins, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 16 Pet. 1 (1842), was never suggested by the parties, and had not been urged or considered in the court of appeals. Other examples, directly on point, include cases such as *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), and *Elkins v. Moreno*, 435 U.S. 647 (1978), where the Supreme Court *sua sponte* certified issues to state courts without that procedure having been requested in the court of appeals.

2. The Fifth Circuit's decision of an important issue of Mississippi law by "*Erie*-guess", instead of certifying it to the state's Supreme Court, is appropriate for review. Typically, certification of state law issues will be ordered by a federal court on its own motion, as numerous cases cited in the Petition demonstrate. That is because a court "is in the best position to determine whether it feels confident in its reading of state law." 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4248, 176 (2d ed. 1988). There are understandable reasons why a party may not seek to invoke the process, such as counsel's lack of familiarity with it, fear of offending the court by asking, or expectation that the court will order it *sua sponte* if needed. Counsel, as advocate for a party, may be genuinely convinced that state law is perfectly clear and in the client's favor, without perceiving the problems the court will encounter in trying to reach a balanced and correct prediction. The mere fact that a party did not urge certification therefore should not be deemed a waiver or procedural bar to contending that it should have been used in preference to an "*Erie*-guess".

Certification, in any event, cannot fairly be viewed as a "claim" of a party which is subject to waiver. Rather, the procedure is properly understood as a means of judicial

decision-making that should be used, as a prudential matter, whenever necessary to reach the correct legal result and to accommodate state interests, whether the parties ask for it or not. That is because, in finding the law, a federal court of appeals has an affirmative duty to get it right — even when the parties fail to make the right arguments or to cite the relevant precedent. As the *amici* have pointed out:

> A federal court hearing private civil litigation should not await an affirmative request by one of the parties before certifying an issue to state court, as the state and public interests at stake — including the state's interest in having its own courts decide important matters of state law — often far transcend the interests of any particular party.

Brief of the State of Texas, et al., as Amici Curiae Supporting Petitioner, 4.

Thus in *Elder v. Holloway*, 510 U.S. ___, 127 L.Ed. 2d 344, 348 (1994), a § 1983 civil rights suit against state police officers which was dismissed on grounds of qualified immunity, this Court in reversing the Ninth Circuit made clear that the court of appeals has an obligation to apply "all relevant precedents" regardless of whether they have been presented or considered below. This is especially true in suits involving vital interests and important public policies of states whose law is being interpreted by the federal court.

3. **Petitioner has not improperly "switched horses" in this case**. Respondent argues that Petitioner should be barred from being heard here because she contended below that Mississippi law "was clear and...unequivocally in her favor." (Opp. 26-27). While her attorneys in the district court

and the court of appeals did express that view, both courts ruled to the contrary. The courts' ruling that Mississippi law was ***not*** settled thereby became the law of the case, binding on both parties. There is nothing strange or inconsistent in Petitioner's acceptance of that judicial determination but also contending that certification was the appropriate procedure, rather than the "*Erie* guess" to resolve the state law issues.

4. **Respondent repeatedly misstates Petitioner's position on certification**. For example, Petitioner has never suggested that the certification procedure should be "universally extended" to all cases involving state law issues or to cases where state law is not uncertain; nor would Petitioner want it used "to burden the Mississippi Supreme Court with repetitive questions" where controlling precedent exists. (Opp. 18, 21). The great bulk of cases handled by the federal judiciary under state law — such as note collection and personal injury actions between parties of diverse citizenship — involve well-established rules of decision that are readily determined, for which certification is not needed. All Petitioner suggests is that certification, where available under state law, should presumptively be used by federal courts of appeals to aid them in deciding important issues of state law that have not been resolved by the state courts, and the use of terminology like "guess" and "predict" in a case is a good indicator of the appropriateness of certification. But judicial discretion not to use the procedure for reasons stated, in particular cases, would survive. Petitioner's position does not in any respect strip federal courts of statutory jurisdiction or encourage them "to abdicate their Article III function" as Respondent says. (Opp. 17). With certification, the federal courts retain jurisdiction while enhancing the quality of their decision-making by getting appropriate input from the state courts.

5. **The court of appeals did not conduct *de novo* review, and Petitioner did not waive her right to appellate review under that standard.** Respondent argues that there is no way to tell whether the court of appeals failed to comply with the requirement for *de novo* review under *Salve Regina College v. Russell*, 499 U.S. 225 (1991). (Opp. 9). But this argument ignores a significant problem in the opinion.

Petitioner asserted an individual claim against Respondent for misrepresentation or breach of duty to her personally — a claim separate and distinct from those asserted on behalf of her deceased husband's estate. This claim was supported, *inter alia*, by Petitioner's uncontested affidavit establishing that she had relied on Respondent's conduct as assurance that her husband did not have a contagious disease, while in fact Respondent knew that he had the deadly, sexually-transmitted AIDS virus. The district court granted summary judgment dismissing Petitioner's personal claim, but its memorandum opinion did not attempt to analyze that claim or explain why those facts could not be sufficient to establish liability under Mississippi law.

Thus when the court of appeals affirmed, there was no stated rationale for it to adopt regarding the supposed legal insufficiency of Petitioner's personal claim. The court of appeals could not possibly have found "that the district court's analytical sophistication and research have exhausted the state law inquiry" on that issue, because the personal claim was not discussed at all. See *Salve Regina* at 232-33. The obvious inference is that the court of appeals did not focus on Petitioner's claim any more than the district court had. Respondent's repeated assertions that the opinion

addressed "each and every claim made by Petitioner" (Opp. 10) do not make it so.

Respondent also argues that, because Petitioner failed to mention the standard of review issue in her suggestion for rehearing *en banc*, she is barred from complaining now that the court of appeals applied the wrong standard. But it is conceded that Petitioner's appeal brief specified *de novo* review as the applicable standard. (Opp. 9). The two decisions on which Respondent relies for this point, *Youakim v. Miller*, 425 U.S. 231 (1976), and *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983), do not support its argument. Each case deals with points of law **never** raised below. Neither case indicates that a point timely asserted below must be reasserted in a suggestion for rehearing after the court of appeals has acted.

6. **Any misrepresentations of the record have come from Respondent, not Petitioner**. In its opposition brief Respondent alleges that Petitioner has made "many misrepresentations" of the record. (Opp. 3). That is simply not so. In fact, the factual background set out in the Petition is generally taken from the opinion below (A4-A7), and the only misstatements of the record are those made by Respondent.

Respondent, for example, indignantly denies receiving letters from Petitioner's late husband requesting his medical test results until shortly before his death in 1991. (Opp. 4, n.2). But, according to the district court, Respondent chose as a matter of litigation strategy not to dispute that the repeated earlier requests were made. (A6). Additionally, Petitioner's uncontroverted affidavit in the district court established that Respondent's home office confirmed to her in 1988 that it

had received her husband's request and was processing it. Respondent likewise now denies that the HIV test results were received by its medical director, Dr. Stewart (Opp. 4, n.1), but the district court found that "on April 21, 1988, the laboratory sent a telecopy of the [test] results to Dr. Lewis L. Stewart, Jr., JNL's medical director." (A5). The insurance company's flat denial that the couple was trying to conceive a child (Opp. 5, n.4) is both callous and false. Respondent well knows that it demanded and received extensive medical records from Petitioner, documenting her numerous miscarriages as well as treatment by infertility specialists over a period of many years up to the time that she learned of her husband's infection in 1989. Respondent further asserts that "the record does not support" the point that Petitioner's husband did not engage in activities exposing him to the risk of AIDS. This is another misrepresentation by Respondent, which ***itself*** introduced medical records into the summary judgment record, establishing that the deceased husband was not involved in HIV risk activities. See Exh. G, Index of Exhibits filed by Defendant JNL, Dist. Court Dkt. # 48.

Respondent charges that "Petitioner fails to note" that the Rules and Regulations Governing Reportable Diseases of the Mississippi State Department of Health "only apply to physicians within the State of Mississippi." (Opp. 5). This assertion, however, is refuted by the State of Mississippi itself, which quotes the pertinent Health Department regulation as follows:

> Each physician, including each pathologist, dentist, and nurse, **as well as the superintendent, administrator, or other person in charge of any hospital, institution, school or day care center**

> shall report to the State Department of Health any case or suspected case of communicable disease or reportable disease, including those hereinafter listed, which he is attending, has examined, or of which he has knowledge. . . .

Mississippi Amicus Br., 4-5 (emphasis added). The text of the regulation in fact makes clear that several important issues of Mississippi law and the proper construction of the Mississippi public health regulations are raised in this case: whether the regulation on its face applies — as respondent claims — "only" to physicians in Mississippi; whether a life insurance company that obtains and uses blood tests and other medical procedures in the regular course of business, in order to ascertain the existence of communicable diseases such as HIV infection, is an "institution" or otherwise covered by the regulation; and whether the fact that a company is headquartered outside the state, while actively engaging in business in Mississippi, shields it from application of the State Health Department regulation. The State's *amicus* brief forcefully points out that questions of the proper interpretation and application of its health regulations and statutes should be reserved to the Mississippi Supreme Court "[b]ecause of the compelling state interest in adequate, timely reporting of information regarding communicable diseases.... It is simply inappropriate for a federal court, sitting as a result of jurisdiction based on diversity, to decide public policy matters of such importance." *Id.*, 6.

Finally Respondent asserts that, because HIV testing of Petitioner has proved negative, "there is no realistic chance" that she was infected by her husband. (Opp. 5-6). Apart from the fact that this assertion is irrelevant to the Petition and

pertains only to the issue of damages, not to liability, the underwriting manual used by Respondent (which is in the record) states that some persons who are infected "may never develop HIV antibodies and remain seronegative" even though they have the disease. Dep. Exh. 28, Mercantile & General Reinsurance Life Underwriting Manual at 22-4, Dist. Court Dkt. # 39, Itemization of Facts Appendix, Tab 27.

Respondent's misbegotten efforts to divert and mislead this Court, by pretending that Petitioner's factual statements about the case are incorrect, create no reason to overlook the important prudential issues of judicial administration and federalism raised in the petition.

7. **Respondent's professed concern over the docket of the Mississippi Supreme Court is misplaced**. Respondent refers in several places to the backlog of the Mississippi Supreme Court (*e.g.*, Opp. 29), but the State itself has raised no such concern in its *amicus* brief. Moreover, the report of the Administrator of the Mississippi Supreme Court, attached as an appendix to Respondent's brief, indicates that the court's backlog of appellate cases has been significantly reduced and is expected to disappear in the near future. S. Kirchmayr, "Reducing the Appellate Backlog," Mississippi Judicial College News, Vol VII, No. 3 (Winter 1996).

CONCLUSION

The Court should issue a writ of certiorari as requested, and upon review should vacate the decision of the court of appeals and remand the case with instructions to certify the state law issues to the Supreme Court of Mississippi pursuant to Rule 20 of the Mississippi Rules of Appellate Procedure.

Respectfully submitted,

Reuben B. Robertson III
Counsel of Record
James F. Flug
INGERSOLL AND BLOCH
1401 Sixteenth St., N.W.
Washington, DC 20036
(202) 232-1015

Dated: January 28, 1997